

*United States Court of Appeals
for the Second Circuit*



APPENDIX

NO. 75-4232

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

v.

MERCY COLLEGE,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

APPENDIX

EKKIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board,
Washington, D.C. 20570



PAGINATION AS IN ORIGINAL COPY

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MERCY COLLEGE,)
)
 Employer,)
 and) Case No. 2-RC-16181
)
)
)
MERCY COLLEGE FACULTY COUNCIL,)
)
 Petitioner.)
)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Mercy College

Case Nos.: 2-CA-13565 and 2-RC-16181

- 5.17.73 Petition filed
- 5.29.73 Respondent's Post-Hearing Brief, dated July 29
- 6.7.73 Hearing opened
- 6.15.73 Hearing closed
- 6.29.73 Respondent's Post-Hearing Brief, dated
- 7.3.73 Charging Party's Post-Hearing Brief, dated
- 7.12.73 Decision and Direction Of Election, dated
- 7.23.73 Respondent's Request for Review, dated
- 8.3.73 Board's telegram denying Respondent's request for review, dated
- 11.8.73 Notice of Election, held
- 11.8.73 Tally of Ballots, dated
- 11.13.73 Respondent's Objections, dated
- 3.7.74 Supplemental Decision, dated
- 3.12.74 Respondent's letter requesting an extension of time, dated

3.12.74 Board's telegram denying request for review, dated
3.13.74 Charging Party's letter in opposition to Respondent's extension of time, dated.
4.5.74 Respondent's Request For Review, dated
4.22.74 Charging Party's Response To Respondent's Request For Review, dated
5.1.74 Board's telegram denying in part Respondent's request for Review dated
5.6.74 Respondent's telegram requesting reconsideration of Issue Two in its request for review, dated
5.7.74 Charging Party's telegram urging Board to deny Respondent's latest request for reconsideration, dated
5.13.74 Board's telegram denying Respondent's request for reconsideration, dated
8.16.74 Decision On Review and Order, dated
8.26.74 Revised Tally of Ballots, dated
8.30.74 Certification Of Representative, dated
12.24.74 2-CA-13565
12.24.74 Charge filed
2.6.75 Complaint and Notice of Hearing, dated
2.18.75 Respondent's Answer, dated
3.19.75 Amendment To Respondent's Answer, dated
1.13.75 Respondent's letter requesting that it be furnished all materials of the Board relating to its consideration of the Employer's request for review, dated
2.3.75 Board's letter denying Respondent's request, dated
2.11.75 Respondent's letter requesting that it be furnished certain materials, dated

3.13.75 Board's telegraphic Order denying request for review nunc pro tunc, dated

3.14.75 Respondent's letter requesting certain documents and information relating to the Board's Order, dated

3.14.75 Board's letter denying request for certain documents, dated March 14, 1975

3.25.75 Regional Director's Order Postponing Hearing, dated

4.4.75 Petition For Summary Judgment and Decision, dated

4.4.75 Motion For Summary Judgment and Issuance Of Decision and Order, dated

4.22.75 Order Transferring Proceeding To The Board and Notice To Show Cause, dated

5.15.75 Statement In Opposition To Petition For Summary Judgment dated

5.27.75 Statement On Behalf Of Charging Party In Reply To Employer's Statement And In Support Of General Counsel's Motion For Summary Judgment, dated

7.11.75 Decision and Order, dated

9.11.75 Respondent's Motion For Reconsideration and Issuance of Order Directing A New Election, dated

9.19.75 Board's letter, dated

9.23.75 Respondent's letter urging reconsideration, dated

10.8.75 Board's telegram denying Employer's request for review of rejection of Employer's Motion for Reconsideration, dated

EXHIBIT A

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD			Form Approved Budget Bureau No. 64-R00214					
PETITION			DO NOT WRITE IN THIS SPACE					
<small>INSTANT PETITION IS TO BE FILED AND FOUR (4) COPIES OF THIS PETITION IS TO BE FILED WITH THE NATIONAL LABOR RELATIONS BOARD. IF MORE SPACE IS REQUIRED FOR ANY ONE ITEM, ATTACH ADDITIONAL SHEETS, NUMBERING THEM ACCORDINGLY.</small>								
<small>The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.</small>								
<small>1. Purpose of this Petition (If <input checked="" type="checkbox"/> AC, <input type="checkbox"/> RM, or <input type="checkbox"/> RD is checked and a charge under Section 8(b)(4)-(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)</small>								
<small>1. Check one:</small> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. <input type="checkbox"/> RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner. <input type="checkbox"/> RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. <input type="checkbox"/> LD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded. <input type="checkbox"/> UC-UNIT CLARIFICATION - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one.) <input type="checkbox"/> In unit previously certified in Case No. _____. <input type="checkbox"/> AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____. <small>Check statement describing the specific amendment sought:</small>								
<small>2. NAME OF EMPLOYER</small> Mercy College		<small>EMPLOYEE REPRESENTATIVE TO CONTACT</small> Dr. Donald Grunewald		<small>PHONE NO. 914-3-4500</small>				
<small>3. ADDRESS OF ESTABLISHMENT INVOLVED (Street and number, city, state, and ZIP Code)</small> 555 Broadway, Dobbs Ferry, New York 10522								
<small>4a. TYPE OF ESTABLISHMENT (Facility, mine, warehouse, etc.)</small> College		<small>4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE</small> Education						
<small>5. Unit Involved (If L.C. status, describe PRESENT bargaining unit and attach description of proposed bargaining unit)</small> <small>Included:</small> All Full Time Members of Faculty of Instruction and Librarians								
				<small>6a. NUMBER OF EMPLOYEES IN UNIT</small> <small>PRESENT: 62</small> <small>PROPOSED (BY UC/AC)</small>				
<small>6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?</small> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO <small>*Not applicable in RM, LC, and AC</small>								
<small>7a. <input type="checkbox"/> Request for recognition as Bargaining Representative was made on April 30, 1973 (Month, day, year) and Employer declined recognition on or about May 3, 1973 (Month, day, year). (If no reply received, so state.)</small>								
<small>7b. <input type="checkbox"/> Petitioner is currently recognized as Bargaining Representative and desires certification under the act.</small>								
<small>8. Recognized or Certified Bargaining Agent (If there is none, so state)</small> <table border="1" style="width: 100%;"> <tr> <td style="width: 50%;"> <small>NAME</small> None </td> <td style="width: 50%;"> <small>AFFILIATION</small> </td> </tr> <tr> <td colspan="2"> <small>ADDRESS</small> </td> </tr> </table>					<small>NAME</small> None	<small>AFFILIATION</small>	<small>ADDRESS</small>	
<small>NAME</small> None	<small>AFFILIATION</small>							
<small>ADDRESS</small>								
<small>9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Month, day, year)</small>		<small>10. IF YOU HAVE CHECKED BOX IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)</small>						
<small>11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT INVOLVED?</small>		<small>11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?</small>						
<small>11c. THE EMPLOYER HAS BEEN RECENTLY BY OR ON BEHALF OF (Insert name) A LABOR ORGANIZATION, OR (Insert address) SINCE (Month, day, year)</small>								
<small>12. ORGANIZATIONS OF INDIVIDUALS OTHER THAN PETITIONER AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11b WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DISCUSSED IN ITEMS ABOVE (If none, so state)</small>								
<small>NAME</small> None		<small>AFFILIATION</small>		<small>DATE OF CLAIM (Required only if petition is filed as Employer)</small>				
<small>I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.</small> <small>Mercy College Faculty Council</small> <small>(Petitioner and affiliation, if any)</small> <small>By: <i>Ann E. Graw</i> (Signature of representative or person filing petition)</small> <small>President (Title of wage)</small> <small>Address: 555 Broadway, Dobbs Ferry, N.Y. 10522 (Street and number, city, state and ZIP Code)</small> <small>914-693-4500 (Telephone number)</small>								
<small>WHILST FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)</small>								

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Second Region

In the Matter of:

MERCY COLLEGE

Employer

and

Case No.

MERCY COLLEGE FACULTY COUNCIL

2-RC-16181

Petitioner

26 Federal Plaza,
New York, New York
Thursday, June 7, 1973

The above-entitled matter came on for hearing, pursuant to notice, at
2:00 p.m.

BEFORE:

HOWARD SHAPIRO, Hearing Officer.

APPEARANCES:

SAUL KRAMER, ESQ.

Proskauer, Rose, Goetz &
Mendelsohn, Esqs., 300 Park
Avenue, New York, New York, ap-
pearing on behalf of the Employer.

JACK J. SISSMAN, ESQ.

Eugene M. Kaufman, Esq., 260 Park
Avenue, New York, New York, appear-
ing on behalf of the Petitioner.

* * * *

5 HEARING OFFICER: Mr. Kramer, at this time you indicated that you wanted to make a statement.

MR. KRAMER: Yes, Mr. Hearing Officer, the reason why we are here this afternoon at a formal hearing is that we have, as you know, been unable to agree on a consent election.

The only reason, as the employer sees it, that we were not able to do so is that we were unable to agree that the petitioner should appear on the ballot as the Mercy College Faculty Council.

In our view, this name is one calculated to decieve the voters, the members of our faculty who are going to participate in the election.

* * * *

6 HEARING OFFICER: Will you allow me to let me make you make this statement at the appropriate time. Prior to the hearing the company supplied the following stipulation.

Mercy College is a private, non-profit college located at 555 Broadway, Dobbs Ferry, New York. During the past year, the college derived gross revenues in excess of \$1 million from tuition fees of which in excess of \$50,000 was received from outside the State of New York.

Mr. Kramer, is that a fair statement of the business and operations of the company?

MR. KRAMER: It is, Mr. Hearing Officer.

HEARING OFFICER: Mr. Kramer, on behalf of the company, do you stipulate that the company is engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended?

MR. KRAMER: On behalf of the college, I would so stipulate.

HEARING OFFICER: Do you so stipulate, Mr. Sissman, on behalf of the petitioner?

MR. SISSMAN: Yes.

* * * *

7 HEARING OFFICER: Mr. Kramer, is the correct and legal name of the company that by which it has been designated in these proceedings, that is, Mercy College?

MR. KRAMER: Well, Mr. Hearing Officer, we prefer to have the employer in this case referred to as the employer rather than the company.

The proper name is Mercy College, yes.

HEARING OFFICER: Okay. Fine.

Mr. Sissman, is the correct name of the petitioner that which appears on the petition filed in this case, that is, Mercy College Faculty Council?

MR. SISSMAN: That is correct.

MR. KRAMER: We would not be willing to stipulate to that. That is a matter in issue between us.

HEARING OFFICER: Let me just ask the appropriate question.

Can it be stipulated that the petitioner herein, Mercy College Faculty Council — is there any affiliation, Mr. Sissman?

MR. SISSMAN: None at all.

8 HEARING OFFICER: Unaffiliated, is a labor organization within the meaning of the National Labor Relations Act, as amended?

Do you so stipulate, Mr. Kramer, on behalf of the company?

MR. KRAMER: We do not.

HEARING OFFICER: Do you so stipulate, Mr. Sissman, on behalf of the petitioner?

MR. SISSMAN: Yes.

* * * *

MR. KRAMER: Mr. Hearing Officer, as we stated previously, in our view, the use of the name Mercy College Faculty Council on the ballot is

9 calculated to deceive the voter at the election, members of our faculty.

A nonmisleading ballot description would in our view be as follows:

"Mercy College Faculty Council (affiliation pending-NYSUT-NEA/AFT-AFL-CIO)."

As you know, because you are involved, on May 4, 1973, in case or matter No. 2-RC-16168, this very petitioner, Mercy College Faculty Council, filed a petition in this very region and denominated itself, and I quote again, "Mercy College Faculty Council (Affiliation pending - NSUT-NEA/AFT-AFL-CIO)." A petition was signed by Bernard Koozman, who we will prove to be a paid organizer for the labor union or labor organization known as the New York State Union of Teachers and as we will show by evidence, assuming we are permitted to do so, Mr. Hearing Officer, that the demand for recognition that we received on behalf of the Mercy College Faculty Council was made by Mr. Koozman, who styled himself in the writing in which we received this demand, as "field representative" and who made the demand for recognition on the letter head of the New York State Union of Teachers.

* * * *

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10 What we are seeking to do here, and the only thing that we are seeking
to do here, is to have our faculty understand what they are really balloting on.
We think that it is important to our faculty whether the Mercy College
Faculty Council is independent or is affiliated or has an affiliation pending de
facto or de jure with an AFL-CIO union.

We think it is important to our faculty and we think it is important that the Board have the organization properly named on the ballot so that an informed and intelligent choice can be made.

I note in passing, Mr. Hearing Officer, we did not make or generate this issue. A petition was filed in case 16168, where the petition denominated itself as being affiliated — having an affiliation pending. So that that issue

sprung from the papers filed by this very petitioner, not from anything that the employer has done in this case.

As you know, we are prepared to litigate that issue, the issue of name, in case 16168. The petitioner then withdrew its petition before we could have a litigation in that over our objection, which I am sure we noted to you, and the next day filed a petition without the appellation affiliation pending NYSUT, NEA/AFT, AFL-CIO.

The reason we object to the petition being withdrawn, is we felt that that issue should have been litigated in that particular case and that we shouldn't have to come back here after a delay of several weeks and sit down and litigate the issue that we were ready to litigate in that very case.

The issue however has not gone away. The issue is one of what the ballot should read and has the informed choice of our people should be.

* * * * *

12 MR. SISSMAN: I would like to be heard on this. We are prepared to make certain concessions I think that will cut through, separate the wheat from the chaff.

No. 1, Bernard Koozman is a paid employee, a field organizer for the New York State United Teachers, a labor organization recognized by the NLRB. Bernard Koozman did file a petition and did indicate that an affiliation was pending although he was not required to do so by the rules of the NLRB or

13 on the application itself.

At the time that he filed that previous petition, there was no application that was accepted. There is none at the present time. The affiliation remains still the same as it was then, pending.

We admit everything that has been said here before. Bernard Koozman is a field representative. He did help teacher groups organize themselves and there was an application, an affiliation pending. There is no formal affiliation

with New York State United Teachers and we are prepared to prove that.

Certain statements were made here about the teachers on this faculty being misled. We are prepared to prove the teachers on the faculty are completely aware of what the present status is.

It seems to me that under NLRB rules, a labor organization has a perfect right to delineate the name that it is to be known by.

At the present time, the organization is known as Mercy College Faculty Council. It is not at present affiliated with any other labor organization, de jure, de factor, or any way he wants to delineate it.

14

At some time in the future, there may be a formal affiliation, that depends upon the choice of the membership. It depends upon whether this unit is recognized. But at the present time, this is the name of the organization, and at the present time, there is no formal affiliation with any other labor organization and at the present time, nobody on that faculty has been misled by what has taken place here.

* * * *

15

ANN E. GROW

called as a witness, having been first duly sworn, was examined and testified as follows:

HEARING OFFICER: Would you state your name and your position.

THE WITNESS: Dr. Ann E. Grow, professor of philosophy, president of the Mercy College Faculty Council.

DIRECT EXAMINATION

Q. (By Mr. Sissman) Professor Grow, how long have you been at Mercy College? A. Since 1963, September 1963.

Q. For how long a period of time have you been president of the Mercy College Faculty Council? A. Since February of this year.

Q. Since February of this year? A. Yes. The council was

organized during last summer. Was officially approved and ratified in September, October, and we elected officers at that time, and I was a member of the advisory board of executive board. The regular time for new elections was in January, February and at that time I was elected the president.

Q. You say it was approved officially organized and approved.

16 Q. Who approved the organization? A. Well, the faculty ratified the bylaws and subsequently — we had previously had an organization of five elected faculty members called a Faculty Welfare Committee. I had been chairman of that three years ago. And in an effort to secure the faculty representation and participation, we had worked through a college senate which the faculty had rejected because the by laws contained an absolute veto and so we went for about eight months last year with nothing but this Faculty Welfare Committee, which had only — had no real power or status and decided then to organize ourselves into a body to identify ourselves as a faculty and last May we voted upon a committee to work on bylaws through the summer.

That committee reported to the faculty in September and we had approximately three meetings at which we worked through and amended and so on and finally approved the bylaws of the Faculty Council.

Q. Who was on that committee? A. Mr. Richard Miller, Mrs. Betty Levine and Dr. James Lindsay.

Q. Are they faculty members presently at Mercy College? A. Yes, they are.

Q. To your knowledge, are they in the employ of any labor organization or were they at that time? A. No.

* * * * *

17 Q. To your knowledge, were they in the employ of New York State United Teachers, AFL-CIO, American Federation of Teachers, National Education Association or its affiliates at that time? A. No.

Q. Or predecessor organizations at that time? A. No.

Q. Were they in the employ of any other labor union at that time?

A. To my knowledge, they were not.

Q. To your knowledge, are they in the employ of any labor union at the present time? A. No.

Q. Did there come a time when your group picked a name for itself?

A. I believe the name was included on the initial bylaws that were handed 18 out and we accepted — that was never subject to discussion so they accepted. I have copies of the bylaws.

* * * *

19 Q. The title of the bylaws, by laws of Mercy College Faculty Council, 20 is that correct? A. That's correct.

Q. At the time that the bylaws were amended on March 5th, 1973, was there any amendment made as to the name of that organization?

A. No, there was not.

Q. Was the organization affiliated at that time with any labor organization? A. No, it was not.

Q. Now, did there come a time in April of this year when your organization solicited authorization and designations from various faculty members? A. Yes. At the March 5th meeting, the minutes will show, that the body, Faculty Council body, moved and seconded that the Faculty Council invite a representative from the United Federation of College Teachers to come to Mercy College for purposes of discussion. There had been requests made to the executive board prior to that meeting asking that we — because we saw ourselves as inadequate to the task of obtaining the legitimate representation for ourselves, there was the express desire that we consider becoming recognized and having that right secured by legal power and so the body moved that we invite a representative for information sake from what we thought was

21 the United Federation of College Teachers, which turned out to be the contrary. I called and talked to Dr. Bellseller would it be possible and we settled upon a date and time. I agreed to put that in writing to confirm it, which I did. I could not have a copy of the letter that I sent her. I am my own secretary and I do not do this. When I hadn't heard from her I called her and she said, "I never received your letter," and there was some confusion. She said, "I will have to find a substitute, I cannot come myself," and she then looked around and said that Arnold Cantor would come.

Q. Did Mr. Cantor come to the faculty? A. Mr. Cantor spoke to the faculty at the next Faculty Council meeting, which was Wednesday, April 4th. The minutes read Arnold Cantor, a representative of the United Federation of College Teachers, addressed the Faculty Council, and it was a rather free-ranging kind of explanation of the law, what we had a right to do; the ways in which we could proceed. We could proceed by having our own organization certified and function that way. We could decide to have an affiliation immediately and have the election go for the affiliation or affiliated group which might be the New York State United Teachers or the AAUP or other organizations and there were lots of questions asked. He talked about the benefits of it, the history of it, various things. The faculty — there was a prearranged kind of discussion with many questions asked and

22 at the time of the end we thanked them.

Q. At that time was any solicitation made by Mr. Cantor that you sign any cards to affiliate yourselves with his organization? A. None whatsoever. He really underplayed very much his role. He was only there to give information. He was not there to speak for the professional conference, which of course was the City University.

Q. Do you recall the date of that meeting? A. April 4th, 1973.

Q. Did you request additional information or material? A. In discussion with him afterward, we did, we said we would some follow-up information and he said I would put you in touch with the appropriate people who can help you with your application to NLRB.

* * * *

24 Q. Were the meetings held of the executive board of the Faculty Council during this period of time, around March or April? A. Yes.

Q. At any of these meetings that were held, was a vote taken to authorize you to commit the executive board of the Faculty Council or the Faculty Council itself to affiliate itself with any organizations, labor organizations? A. No.

25 Q. Did you ever make any unofficial unauthorized representations to any labor organization that the Faculty Council would or would not, one way or the other, affiliate itself with them? A. No.

Q. Did there come a time in April of this year when Mercy College Faculty Council solicited authorization and designation sheets, cards, or statements from various faculty members? A. Yes, we have them out, I believe, on April 18th.

* * * *

26 Q. I show you blank form called authorization and designation.

A. That's correct

Q. Is this the form that was submitted to the faculty for their signature?

A. Yes, it was.

* * * *

Q. (By Mr. Kramer) I show you Petitioner's Exhibit 3 marked for identification, particularly to the line that starts, "I hereby designate and authorize," and then apparently typed in is Mercy College Faculty Council.

When this was distributed to the faculty, was Mercy College Faculty Council typed in there? A. Not on all of them. If you will notice I have another

27 paper which was the paper that was associated with, that was given out with them. We really didn't have time because we wanted to give them out at that next meeting and we were running short on time in order to have an election this semester so I directed them in the directions which were written, that in that line you are to put Mercy College Faculty Council.

Q. Your answer to the question is — A. Some of them had it and some didn't.

Q. You are sure about that? A. Yes.

Q. I turn to the X's under the word "witness," around the word "witness." A. The same thing holds. Some of them were X'd out and some were directed verbally. As a matter of fact —

Q. I just asked you if the X's were there. A. On some there were.

Q. And some they weren't. That's your testimony.

* * * * *

28 Q. (By Mr. Sissman) At the time that this application, this authorization, was handed out, was it handed out by itself or with any other documentation?

A. It was handed out with a set of directions, and a pink form which is a membership form, I guess you would call it.

* * * * *

Q. All right.

Now, was one of the documents that it was handed out with a memorandum of instructions? A. That's correct.

Q. And was another document that was handed out with it a pink application membership card? A. That's correct.

29 Q. For the American Federation of Teachers? A. Again the pink card —

Q. Yes or no. A. Well, not everybody got the pink card.

* * * * *

30 Q. Is this the memorandum with the attached documents that you made reference to before that was handed out on - A. To those present at the meeting we give them and we divided up the others to give them to those who were not present at the meeting.

Q. Did every one at the meeting get a full set of these documents?

A. That's correct.

Q. Were there any people at the meeting who did not get the document that's marked Petitioner's Exhibit 4-B? A. Not to my knowledge.

* * * *

(Petitioner's Exhibits 4-A, 4-B and 4-C for identification were received into evidence.)

Q. How many faculty members received that? A. I don't know that.

31 Q. How many faculty members are there, do you know? A. At the time, around 63 or so that we judge full time faculty.

Q. And did you approach all 63 with this application form? A. I cannot say that. We gave them out to those who were present at the meeting and we divided up the other names. I cannot say whether or not everybody was approached.

HEARING OFFICER: How many people were present at that meeting, approximately, if you can recall?

THE WITNESS: 29 members, approximately 29 members of the faculty of instruction were present, according to the minutes.

Q. You say that other names were divided up.

Were they divided up among other members of the Faculty Council?

A. Yes.

Q. For contacting purposes? A. Yes.

Q. Did you receive several names or take several names yourself?

A. Yes, I did.

Q. Do you recall now many other names, not the names per se, but how
32 many other individuals, you were obligated to contact? A. Five, approx-
imately five.

Q. And how many other individuals were assigned this role of contacting
other faculty members? A. Approximately seven.

Q. And each were assigned the task of contacting approximately a half
a dozen or so other faculty members? A. That's right.

Q. Were they all given this memorandum or this documentation to dis-
tribute? A. In some cases, they got the second one, which I had time then
- I had to reproduce because I didn't - having given them out -

Q. Just answer the question. A. In some cases they got the one
in which Faculty Council had been typed up and need for a witness had been X-d
out. And in some cases they did not get the pink slip because we had run out of
them.

Q. Now, calling your attention to Petitioner's Exhibit 4-A, I guess that
is -

MR. SISSMAN: Is that right?

HEARING OFFICER: The first page is 4-A.

Q. - were any faculty members told to sign that pink card? A. No,
they were not.

33 Q. As a matter of fact, they were specifically told not to at that time, is
that correct? A. That's correct.

* * * *

Q. Were there questions asked with respect to the pink cards that were
attached? A. Yes, there were.

34 Q. What questions? A. What were they for and were they supposed
to sign them and I said no, we received them. They are the kind of thing that we

would sign if and when we were affiliating, that we will individually have to sign if ever we do affiliate with this organization, and it is by way of information which would alert people to the fact that affiliation would require dues and so on.

So it was a matter of rather than saying we were holding back information, we gave it out with the story that, here they are, when the time comes we are going to have to get more of them anyway and this is by way of information.

Q. Was there any vote made at that meeting whether or not to affiliate with this particular organization? A. No, there was not.

Q. Did there come a time when Bernard Koozman, a field representative of the New York State United Teachers contacted you? A. He never contacted me.

Q. Did you contact him? A. Yes.

Q. Where you contact him? A. I contacted him through - may I go back?

35 Q. Yes. A. As Mr. Cantor in his letter, which is Exhibit 2, indicated, hoped that I had gotten the information, he had said that he would put somebody in touch with us so that we could pursue it further.

After maybe two weeks, nobody had called me. So then I called Mr. Canon back and through him was referred to the Elmsford office where I talked to somebody and explained the case and this - whoever this was, I don't recall - knew from the name of Mr. Cantor, knew that he was supposed to have been relayed the message but he hadn't

So at that time he gave me Bernard Koozman's name and I called him back, I believe, and I finally got to talk to Bernard Koozman, who was the field representative who would assist us and I asked Mr. Koozman to please send us authorization and designation forms so that we could be recognized.

I did this on the telephone.

Q. Did there come a time when Mr. Koozman at your direction wrote or contacted the administration? A. Yes, it was our information

that the petitions should be filed by some official representative. Now, I don't know whether that's correct information or not, but that's what we were operating under. And so we asked him if he would file the authorization forms for us. He came to the college on about, oh, the end of April, I guess, and picked them up from us, picked up the authorization and designation

36 forms, and secured from us the information with which he filled out the petition.

Q. Did you get a chance to see the petition that he filled out at the time after it was filled out? A. No, I did not.

Q. Have you ever seen that petition that he filed? A. Yes.

* * * * *

Q. Is this the petition that Mr. Koozman filled out? A. That's correct.

* * * * *

HEARING OFFICER: Hearing no objection, the document is received.
(Petitioner's exhibit No. 5 for identification was received into evidence.)

37 Q. He filled this out in the name of Mercy College Faculty Council, affiliation pending, NYSUT - National Education Association/American Federation of Teachers, AFL-CIO.

At that time was there an affiliation pending, at the time he filled this out?

MR. KRAMER: Once again that calls for a conclusion of the witness. Whether there was or was not an affiliation is something the Board has to determine.

HEARING OFFICER: To your knowledge, was there an affiliation pending at that time?

THE WITNESS: No.

* * * * *

Q. Was the official name of your organization at that time Mercy College Faculty Council (affiliation pending - NYSUT - NEA/AFT - AFL-CIO); was that the name of your organization? A. No.

MR. KRAMER: I object to the use of the words "official designation." That is for the Board to determine, Mr. Hearing Officer.

38 HEARING OFFICER: Overruled.

Q. Was there any meeting held by your organization to change the bylaws to reflect any other name other than Mercy College Faculty Council? A. No

Q. To your knowledge, have any teachers on the faculty signed those pink membership cards? A. Not to my knowledge.

* * * * *

Q. Has Mercy College Faculty Council signed any documents which would indicate an acceptance or an agreement to affiliate or be affiliated with New York State United Teachers? A. No.

Q. Did there come a time on May 1st when you sent a memorandum to members of the faculty regarding the issue of affiliation? A. Yes.

* * * * *

39 During an off-the-record discussion, the parties agreed to the following:

That the New York Congress of Teachers, Inc. is the labor predecessor to New York State United Teachers.

* * * * *

40 Q. Were there any questions asked of you by any members of the faculty with respect to that memorandum? A. Well, the questions were raised prior to, the questions that were raised prior were the reason for having the memorandum.

Q. What questions were raised prior to preparing the memorandum?

A. I don't have my copy or don't have it accessible, but during the week, or

41 that day, or then perhaps maybe that day or the previous day, the office of the dean had distributed a notice to use that the petition had been filed and a copy of the petition – in his notice he stressed this affiliation pending, et cetera, and included a copy of the petition, as a result of which members of the faculty asked a question.

They said, we understood we were petitioning to have the Faculty Council at this time, and I said that's correct. But my understanding the reason for the additional information was to identify Bernard Koozman and give him a mailing address as the one who was filing our petition, and then because I couldn't talk to everybody, I thought a memorandum to explain that position was in order.

* * * * *

42 Q. At the time that Dr. Grunewald distributed this memorandum to the faculty on April 30th, 1973, did you get a number of questions from the faculty concerning the status of the faculty concerning the status of the faculty council?

A. That's correct. And the reference to the Congress of Teachers.

Q. What were generally the questions that you got? A. Well, who is the Congress of Teachers and are we affiliating with them, you know, have we made any kind of contact or any commitment to them, that type of thing.

Q. What was your response? A. My response was, I didn't even know what the Congress of Teachers was, since I hadn't really carefully read that pink slip and know we had made no affiliation whatsoever.

Q. And is that the information that you imparted or gave out on the May 1st memorandum, is that correct? A. That's correct.

* * * * *

43 Q. Has there been any meeting of the faculty Council since May 1st, 1973?

A. The last meeting of the Faculty Council was May 9th, the last regular meeting of the Faculty Council was May 9th.

Q. How many members attended, if you know? A. Approximately 26 members.

Q. Do you recall whether there was any discussion at that meeting about the pending petition before the NLRB? A. Well, I made a report, I suppose, but there was no discussion as to the question of affiliation. There was

44 a motion made at that meeting. It was moved and seconded that the Faculty Council as a body pass a vote of thanks to the president of the Faculty Council and to the members of the Advisory Board for securing representation for the Council and urges that to continue their efforts.

HEARING OFFICER: That's nice.

* * * * *

45 Q. What was the discussion that took place at the May 9th faculty Council meeting with respect to the composition of the membership in the bargaining unit, the composition of the membership in the bargaining unit, if you

can recall? A. We had been cautioned or somehow we had been made aware that an objection would be raised as to our definition of membership because we had defined the membership of the bargaining unit as all full-time faculty and librarians, and that – and that we had not included part time.

HEARING OFFICER: Faculty and/or librarians.

THE WITNESS: And the librarians. I think the petition states all full-time members of the faculty and librarians.

HEARING OFFICER: Concerning part-timers –

THE WITNESS: We did not included part-time personnel.

* * * * *

Q. When you talk about petition, you are referring to the petition that was submitted and signed by Bernard Koozman, is that correct? A. That's correct.

Q. Continue. A. And the question – and we had a question ourselves as to the fact that that represented an interpretation of the bylaws because the bylaws of the faculty Council indicated that persons teaching at

47 least six hours were eligible for membership, but we had discussed this at the previous meeting and given the reasons why it was our recommendation that we not include part-time people, and there had been no objection raised.

What we did at this meeting was to reopen that discussion on the basis of a proposal which more or less said that the Faculty Council recognized that its desire for the membership — whereas the proposal says — that the Faculty Council agreed that it was all right to proceed with the definition of membership as we had entered it on the petition.

HEARING OFFICER: Please continue.

Q. Was a motion introduced to that effect? A. That's correct.

Q. Then discussion ensued prior to the passage of that motion?

A. That's correct.

Q. Do you recall whether that discussion involved at any time the question of affiliation? A. No, it did not.

Q. Did the subject of affiliation come up at all at the May 9th meeting? If you can recall? A. I don't recall. If it did, it would have been merely to reaffirm what I had said in the memorandum. I don't think it came up. If it did, but it would have been to reaffirm the fact - perhaps the question was raised.

48 If you are sure, then testify what you know, not — A. I'm not
sure, obviously. I think — I can't remember everything that happened —

* * * * *

51 Q. Was the name of your organization as of April 30th, 1973 Mercy
College Faculty Council? A. Yes, it was.

MR. SISSMAN: No further questions

HEARING OFFICER: Mr. Kramer, you may cross-examine.

CROSS-EXAMINATION

Q. (By Mr. Kramer) Ms. Grow, when were you elected president of

the council? A. March 5th, 1973.

Q. It wasn't February, was it? A. Sorry.

52 Q. Let's turn to the meeting of the Faculty Council on March 5, 1973.

* * * *

Q. Did you discuss the faculty organizing, forming a labor organization at that meeting? A. No, we did not.

Q. What did you discuss with respect to that? A. Now, I don't have photographic recall here. I was not the presiding officer at that meeting, if you will notice, I was merely a member who had been elected.

MR. KRAMER: All we would like, Mr. Hearing Officer, is that the witness tell us what she can recall directly and straight without any editorializing.

HEARING OFFICER: Please answer the question.

A. The motion was made that a representative come from the United Federation of College Teachers to tell us about the advantages, disadvantages, procedure, et cetera, of that type of faculty organization.

Q. And it was, was it not the United Federation of College Teachers?

A. That was the terminology that was used, I believe.

Q. And that is what you recall, is that not correct? A. That's correct.

56 Q. Did there come a time when a representative of the New York State United Teachers came to speak to your organization? A. That's correct.

Q. When was that? A. April 4th, 1973.

Q. Who came? A. Arnold Cantor.

Q. Now, between April 4th and March 5th, 1973, did you have any further correspondence with any representative of the New York State United

Teachers? A. No, I did not.

Q. Or any affiliate of that organization? A. No.

Q. Mr. Cantor came on April 4th, is that right? A. That's correct.

Q. I think you have told us that during his discussion, three options were talked about, do you recall that? A. It's recall, you understand.

Q. Everything one testifies to that isn't writing is a recall.

Do you recall testifying just a half hour ago that Mr. Cantor dealt with three options with respect to affiliation? A. Yes.

57 Q. Would you tell us, please, Ms. Grow, what those three options were? A. I don't know if I can remember them as three options. I don't think I saw them as three options. I was just trying to recall the kind of thing that he said in his talk to us. But he did - I recall that he said we could be - we could be recognize, our own body could be recognized and we could choose to function as such, in which we would furnish our own legal aid and set up our own procedures and learn the law and so on ourselves.

Q. Pay for your own lawyer, in other words? A. That's correct.

Q. That's right? A. Yes, or we could affiliate with recognized organizations such as the New York State United Teachers or the AAUP and don't know if he mentioned the NEA or not.

Q. And the third option, Ms. Grow? A. I don't know of a third option.

Q. Wasn't the third option that you could remain unaffiliated prior to the election and then when the election was over could affiliate with NYSUT? A. I don't recall anything like that. I don't recall him saying anything like that.

58 Q. There was no discussion of three options? A. No, there was

no presentation of three options. I was merely relating to you what I

remembered of it. He did not present them as one, two, three in an organized outline and I certainly didn't intend to in my previous testimony.

Q. Were three options discussed in that meeting whether they were presented in an orderly fashion or not? A. By your definition, no

Q. Was the discussion that your organization could remain independent up to an including an election and after the election it could affiliate with New York State United Teachers or some other labor organization? A. No, nothing.

Q. No discussion at all? A. Not of that nature, no

* * * *

MR. SISSMAN: I object. He has asked a question. He's got an answer. I think this is badgering.

HEARING OFFICER: Sustained.

Q. Were there any questions from the floor concerning that procedure?

A. Not that I recall.

Q. Did you raise any questions concerning that procedure? A. No, I did not.

59 Q. In other words, so that I am clear on this, Ms. Grow, there are only two options discussed at that meeting, one staying independent and, two, affiliating prior to an election? A. I guess that's right.

Q. I don't want you to guess. I would like to know. A. I mean, I reject the term options because we didn't discuss options.

Q. I don't want to confuse you by the use of the term "options," Ms. Grow, so I am going to phrase it in some other way.

There were three possibilities that I have just outlined in the last three minutes to you

Were those three possibilities discussed? A. No.

Q. What possibilities, so we understand each other, were discussed?

A. They were not discussed as possibilities at all. He was giving us information, and the information was that we could be certified ourselves, and we could be certified as affiliated, as you recall.

Now, we didn't discuss that aspect. We discussed more at the meeting the pros and cons, the advantages and so on of such recognition, or such certification, however it went.

60 Q. Did you discuss the pros and cons of affiliation? A. No, we did not.

Q. Not a word about it? A. No. I mean the word was mentioned, but we didn't discuss it.

Q. Didn't Mr. Cantor tell you what the advantages of affiliating with the New York State United Teachers would be? A. No, he did not.

Q. Didn't he say what services that organization could provide? A. He did not speak of the services of that organization. He spoke of the services of an organization.

Q. All right. An organization by what name? A. Which could have been the New York State United Teachers or the AAUP, or possibly, as I said, the NEA, which would offer the precedent of procedures already used which would offer legal counsel and which would demand dues.

Q. They would offer legal counsel, is that right? A. Yes.

Q. And they would demand dues? A. That's right.

Q. Would they also provide field representatives and other help for you? A. He didn't say anything like that.

61 Q. Now, did he mention AAUP? A. Yes, he did.

Q. Did he mention the New York State United Teachers? A. No, he didn't.

Q. By the way, he works for an affiliate of the New York State

United Teachers, does he not?

MR. SISSMAN: Objection.

HEARING OFFICER: What grounds?

MR. KRAMER: If she knows, then.

MR. SISSMAN: If she knows.

HEARING OFFICER: Do you know the answer?

THE WITNESS: No, I don't.

MR. KRAMER: This witness is a college professor, she knows how to answer questions.

MR. SISSMAN: And you are a lawyer, you know how to ask them properly.

HEARING OFFICER: That's enough said on that. The answer is she doesn't know the answer.

MR. KRAMER: We will let the record speak for itself.

* * * *

63 Q. Did you receive authorization forms from Mr. Koozman?

A. Yes, I did.

Q. And the form you received from Mr. Koozman —

HEARING OFFICER: Exhibit 3, I think

Q. — is that Exhibit 3 in evidence, Petitioner's Exhibit 3 in evidence, Ms. Grow? A. It didn't have this added and these X's.

Q. By this added you mean — by the deletions you are referring to, are the deletions of Mercy College Faculty Council and the x's which are in the exhibit in evidence? A. That's correct.

Q. In other words, those words were not on there, Mercy College Faculty Council, is that right? A. That's correct.

Q. And the X's appearing on the bottom were not on there?

A. That's correct.

Q. Then you received this from Mr. Koozman, did you not?

A. Yes.

Q. How many copies did you receive from Mr. Koozman, do you know? A. No, I don't.

64 Q. Could you give us an approximation? A. I had told him that our faculty were about 65, so I may have received 65 or less. I don't know. I didn't count them.

Q. In other words, you counted the part-timers when you stated the number, did you? A. That's correct.

Q. They were left out of the count? A. Our definition of membership was full-time and librarians.

Q. Now, Ms. Grow, you brought those — what else did you receive from Mr. Koozman? A. We also received the pink forms.

HEARING OFFICER: Petitioner's Exhibit 4-B, I believe.

Q. Now, would you tell me how you came to receive those pink forms? A. I believe he said, "I will send them along," and I said, "Fine."

Q. Send what along? A. The pink forms, the membership forms, whatever the title of them is. He used the correct title of them.

Q. Ms. Grow, would you give us as best you can recall the conversation you had with Mr. Koozman concerning these forms? What he said and what you said. A. That's what I recall. The conversation with regard to the forms was an afterthought on his part that he would also include the 65 membership forms, which he said we could or could not give out, as we chose, and you know —

Q. You chose, did you not, to give them out? A. For information purposes.

Q. I asked — A. I chose to give them out.

MR. KRAMER: The Board will decide for what purpose.

Q. You gave them out and you gave out the authorization that Mr. Koozman set you? A. That's correct.

Q. And you had them signed in the name of Mercy College Faculty Council, is that right? A. That's correct.

Q. Did the association receive a bill from the New York State United Teachers for the forms that were sent to it? A. Not to my knowledge.

Q. Do you have any bill in your files? A. No, I do Not.

MR. KRAMER: I would ask at the resumed hearing that any bill dated prior to today's hearing be produced, if there is one.

MR. SISSMAN: What resumed hearing are we talking about?

MR. KRAMER: Assuming we go on.

66 HEARING OFFICER: Assuming we adjourn to a later date.

MR. SISSMAN: If it is necessary.

MR. KRAMER: Let's go off the record.

HEARING OFFICER: Off the record

(Discussion off the record)

HEARING OFFICER: On the record.

Q. You know of no bill, is that right? A. That's correct.

Q. And it was sent to you in the mail? A. That's correct.

Q. Who paid the postage? A. I do not know.

Q. But your council didn't pay, did it? A. Who?

Q. The council. A. The Faculty Council?

Q. Yes, ma'am. A. No, we did not.

Q. You did receive the membership cards in the NYSUT also from Mr. Koozman in the mail, did you not? A. I beg your pardon?

Q. The pink form. A. Yes, they were in the same envelope.

Q. The same envelope. All right. You have the bylaws — do you
67 have the minutes of the meetings held by the council between March 5th and May — through May 9, 1973 in front of you? A. Yes, I do.

* * * * *

Q. Would you tell us if there is any place in those minutes where it shows that the Mercy College Faculty Council has authorized the payment of counsel in these proceedings? A. No, there is not.

Q. And counsel in these proceedings is being paid, is it not, by the
68 New York State United Teachers? A. I do not know that.

Q. Now, Dr. Grow, you have counsel sitting right on my left. Haven't you made a fee arrangement with counsel?

MR. SISSMAN: Objection. I don't see that this is pertinent at all, not at all. If he has some direct proof, fine. He is going into an area of cross-examination now that's completely beyond the province of what he could be going into.

I submit that there has been no evidence on direct. If he is trying to impeach her credibility he hasn't done it, he is going into an area completely far afield in this examination.

MR. KRAMER: Before you rule on this objection —

MR. SISSMAN: I am prepared to stipulate that the Faculty Council is not paying me or Eugene Kaufman a fee for the services performed.

MR. KRAMER: I am prepared to accept that stipulation, and I would ask counsel to state who pays him for his services here.

MR. SISSMAN: I think that's completely irrelevant.

MR. KRAMER: Mr. Hearing Officer, I would like to continue. I want to tell you why before you rule. I believe what we have before us is a fronting case. A very difficult issue for a lawyer to prove and one of the evidentiary facets of a fronting case which usually come up in a guard situation

where a group comes in purportedly a guard union that's really fronting for a union that's mixed, is who is paying the attorney who is representing that union in the particular proceeding.

If the union in fact the petitioner has viability, it normally has some kind of an agreement where it retains and pays counsel. Where the other or fronting organization is paying the counsel, while this may not be dispositive of the issue, it is certainly material and relevant on the particular issue.

In this case it can easily be cleared up by a simple sentence.

MR. SISSMAN: My fee and Eugene Kaufman's fee is paid by the United Federation of Teachers, Local 2, AFT, AFL-CIO, it is affiliated with the New York State United Teachers, it is purely a local organization in New York City, it has no operations outside of New York City and that the United Federation of Teachers as one of its services on occasion has helped fledgeling teacher organizations get started and get organized through the issuance of memoranda, through the issuance of brochures and through legal help from time to time.

* * * *

70 HEARING OFFICER: Mr. Kramer, do you accept his stipulation as to who he has been paid by?

MR. KRAMER: More than delighted to do that. The rest is evidence he can testify to under oath.

MR. SISSMAN: I don't have to testify at all. You bring in proof.

MR. KRAMER: Do you know what I am saying? With respect to pay I am more than happy to accept the stipulation. As to what they do with fledgeling organizations, that's testimony.

HEARING OFFICER: Fine.

* * * *

71 Q. (By Mr. Kramer) Looking again to the minutes, Miss Grow, would you tell us any place in those minutes where the Faculty Council has authorized payment of a Mr. Bernard Koozman? A. There is nothing in the

72 minutes that authorized payment to Mr. Bernard Koozman.

Q. In fact, Mr. Koozman has not asked for any payment as well?

A. Excuse me?

Q. In fact, Mr. Koozman has not asked for any payment, Miss Grow?

A. That's correct.

Q. He is not an employee of your organization, is he? A. No.

Q. Now, at the meeting of April 18, 1973, was affiliation discussed?

A. In this respect I believe it was, because I explained that we were going to have an election — we were seeking — the advisory Board was asking them to — or asking that the Faculty Council participate in these petitions that the Faculty Council be recognized, that the pink forms that were included with the kind of forms that individuals would fill out if we were going to affiliate. But that we were not going to consider that issue at this time.

We were going to pursue an election to have the Faculty Council recognized.

Q. And then you were going to consider that issue, isn't that right?

A. That's correct. We would then present the issue of affiliation after we had been recognized but we had now no power. This was a question of

73 faculty vote, if they wanted to, and we had inquired as a matter of fact and found out that then affiliation would not be automatic, that we would have to ask an organization if they would accept us as an affiliate and we would have to show a sufficient number of members willing to pay dues before they would accept it.

In other words —

Q. How did you find this out?

MR. SISSMAN: Let her finish.

HEARING OFFICER: Finish your answer, please.

MR. KRAMER: Okay.

A. I asked Mr. Koozman how would — would we be able to be affiliated afterwards, was this a possibility, what would be the procedures? In other words, we discussed affiliation and the procedures and which was the best way for us to proceed and we concluded and asked the Faculty Council that the best way for us to proceed was to have our own organization recognized, then if the group agreed to affiliation and to affiliation with a particular organization, they would then have to show so by reason of individual signings of membership and willingness to pay dues afterwards.

74

Q. When did you have this discussion with Mr. Koozman? A. We had this discussion — it was after — let me see. I don't know when I had this discussion. It may have been that — it was certainly sometime — if I were able to answer the question that it is not important to fill out these pink forms now, that we are going to ask for an election, I at least knew. Whether I had that specific discussion — I knew from either reading or discussions.

Q. You testified here two minutes ago to a conversation you had with Mr. Koozman.

MR. KRAMER: Would you, Mr. Reporter, please read that piece of testimony back to the witness.

(Record read.)

MR. KRAMER: So there is no question that I am not misstating the record.

Q. You did in fact testify, did you not, Miss Grow, about the — about a conversation with Mr. Koozman? A. That's correct.

Q. And it had to do with the procedures for affiliation after an election, is that not right? A. That's correct.

Q. Will you tell us when that conversation took place? By the way, it had to do with other things as well, did it not? A. I have - my recollection is that conversation took place at the meeting of - in which Mr. Koozman came and picked up the petition ballots from us.

75 Q. I would like you to tell me what you said to Mr. Koozman and what Mr. Koozman said to you? A. Well, there were six of us present in fact, it was a great deal of interchange, this was the Advisory Board meeting with Mr. Koozman, and we discussed the possibilities open to us, No. 1, winning and election for our own organization, No. 2, a possible affiliation to gather strength, and the procedures that we might undergo.

Now, there was - it was a matter of information. In other words, I think it was quite clear to Mr. Koozman and to us that we might stop, we might very well stop at the election of our own body and he stated -

MR. KRAMER: Mr. Hearing Officer, I purposely interrupted the witness at this point which is something I don't like to normally do.

I asked what was said by one person to another. It was perfectly clear -

HEARING OFFICER: You are objecting to the conclusion?

MR. KRAMER: Yes.

HEARING OFFICER: Sustained.

MR. KRAMER: I would like her to tell what was said at this meeting whether there was a discussion of affiliation after an election and it is already on the record.

HEARING OFFICER: Do you want her to continue describing what was said?

76 MR. KRAMER: Yes, sir, I would.

HEARING OFFICER: Continue.

A. As to the best of my recollection, someone said that we might never

go beyond the election which would certify the Faculty Council and I or Mr. Koozman saying that's quite possible and it would be perfectly legitimate we offer this service to help the body to become organized. And then someone of us, now I can't say who in every case, asked how since it is clear that we are not going to affiliate at the time before or at the time of the election and since it is clear that we are not going to make a commitment of affiliation at all, what are the possibilities for us after supposing that we do get certified as a Faculty Council, and I think Mr. Koozman explained that a possibility would be that if enough members of the Faculty agreed to join, to pay dues, that we might then ask his organization or it could be some other organization, would they accept us, that there was nothing automatic.

In other words, at that point we were taking — in a sense, we would have to prove to them that we deserved affiliation by having a sufficiently large number of members willing to pay the dues and actually be members

Q. Miss Grow, let's think back to that meeting.

Wasn't there discussion to the fact that it would be harder to win an NLRB election with an affiliation pending or appended to the Mercy college

77 Faculty Council than without it? A. No, as a matter of fact, that was the same meeting at which we agreed that it was all right to put affiliation pending in order to identify Mr. Koozman. We felt that would be clear enough that we had explained to the faculty that we were only asking for an election of the Faculty Council and that we would if necessary further explain Mr. Koozman having entered our — having submitted our petition and having put them affiliation pending in order to identify him.

Q. At the close of the meeting Mr. Koozman was instructed, was he not, to file a petition that showed affiliation pending, is that right?

A. He wasn't instructed. It was his judgment that this was the best way to do it and we agreed if it were necessary to identify him we agreed that was all right. We did not understand that had any binding in any way identified

us Our identification was as the Mercy College Faculty Council.

Q. Mr. Koozman told you he was going to file it with affiliation pending, did he not? A. He told us that.

Q. You knew it when it was filed, did you not? A. That's correct.

78 Q. The first time you knew about it was not when you saw the petition, is that right? A. Yes, that's correct.

Q. That was following a discussion after April 18th, is that right? A. That's right.

Q. Let's try and put that discussion, get the time for the discussion. Approximately when did it take place? A. It might have been, I don't know, the Friday of the following week, which would be the 27th, April 27. It might have been a Friday. It was a Friday afternoon, as I recall.

Q. On that Friday afternoon - how long did the meeting last? A. I don't remember that. It had no official beginning or ending, it kind of - as a matter of fact, I believe Mr. Koozman left. He had someone with him whose name I don't recall. They left before we finished our meeting.

Q. Now, let's go back. Approximately, Dr. Grow, how long did that meeting last? A. The total meeting might have lasted a couple of hours. I don't know, I don't know.

Q. How long was Mr. Koozman at this meeting? A. Maybe an hour.

79 Q. Mr. Koozman participated in the meeting for an hour? A. Well, there was general discussion.

Q. Miss Grow, I would like to go back to this meeting again, would you as best you can recall now tell us what transpired during the hour that Mr. Koozman was there, the whole hour?

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80 Q. Try to put it in as much of an orderly way as you can. Tell us what was said in this one hour that Mr. Koozman was present. A. I have nothing more to add. My memory does not give me anything more to say on the matter of affiliation. It was not the chief thing that was discussed that afternoon. As a matter of fact, the bulk of the time was used to open the petitions and count them and give them to him.

Q. How many petitions were there? I think it is in the letter.

HEARING OFFICER: When you say petitions, you mean signed authorization cards?

THE WITNESS: Yes, that's right.

Q. I would take that as a correction in my question. There were 46, were there not? A. I do not know. I'm sorry, I do. Yes, there were 46.

Q. And the bulk of this one hour was taken opening these 46 envelopes, is that right? A. I don't remember substantial conversation.

Q. I asked a very simple question.

81 MR. KRAMER: The witness said that the bulk - I am asking her to reconsider.

Q. I asked if the bulk of the hour was spent by these six people you testified were present opening 46 envelopes? A. Well, no, a half hour, may be. I think that part of the time the question of the petitions, we were also among ourselves, Mr. Koozman had not part in the conversation. We were among ourselves analyzing our own efforts and considering what we next had to do and what kind of information we had to get out. That was the kind of conversation, that it didn't really pertain to Mr. Koozman at all.

Q. I don't want to pry into areas that we have no legitimate concern for, just as we didn't want to see the signed authorizations, but I must ask this one question.

Did you consider the tactics concerning the up and coming election campaign during this hour?

MR. SISSMAN: Object. There is an election that might be coming up here and I don't think this is relevant or privy or he should have any of this information at this time.

HEARING OFFICER: What's the purpose of your question?

MR. KRMAER: I think, Mr. Hearing Officer, the Regional Director when all the evidence is in this record will have to conclude that this organization does have a de facto affiliation pending that it should be on the ballot and

82 the reason that they don't want to put it on the ballot is that for tactical reasons they want to hold it off until after the election.

I have been very careful not to try to get into areas where 8(a)(1) or 8(a)(3) can be involved.

HEARING OFFICER: I ask specifically whether or not there were tactics discussed on this specific point, affiliation or not to affiliate.

MR. KRAMER: I am not going to ask it in that context. I will just take an exception to your ruling.

HEARING OFFICER: Okay.

MR. KRAMER: Counsel for the petitioner can ask that question if he chooses to.

MR. SISSMAN: Thank you.

MR. KRAMER: It's up to you.

Q. Now, Miss Grow, who was at the meeting with Mr. Koozman?

A. Which meeting is this?

Q. The one you were just testifying about the hour long meeting.

A. The members of the Faculty Council advisory board and an associate, a woman who is - whose name I have forgotten, I don't know.

HEARING OFFICER: Whose associate?

THE WITNESS: Mr. Koozman brought this woman with him.

83 Q. But not an employee of your organization? A. No. That's right.

Q. Now, let's turn to the meeting.

Is it your testimony, Miss Grow, that the body of the Faculty Council voted on May 9, 1973 not to include part-time faculty members in the unit that was being petitioned for? A. That's not quite my testimony. I can only give you what they voted to do, which is in the minutes.

Q. Let's start with that. Tell us what they voted to do.

A. The proposal was whereas the specific question of the definition of membership of the Faculty Council for purposes of petitioning the NLRB for bargaining status for the Faculty Council at Mercy College was publicly explained, discussed and debated at the regular meeting of the Faculty Council and on April 18, 1973, and whereas said discussion arrived at a consensus that the definition of membership for the above stated purposes shall be the full-time teaching faculty and librarians with certain specified administrators accepted as noted on the NLRB petition, therefore be it resolved that this body, the Faculty Council here assembled does expressly endorse the above indicated definition of the members to be included in the petition for recognition of the Faculty Council as our bargaining representative.

84 nition of the Faculty Council as our bargaining representative.

Isn't it your testimony that you heard from some source, unnamed, I think was the word you used in your testimony, some unnamed source, that the college was going to take the position that the part-time faculty should be included in the bargaining unit, isn't that what you testified to before?

A. That's correct.

Q. And this is why that issue was brought up to the May 9, 1973 meeting of the Faculty Council, that's correct, is it not? A. That's correct.

Q. And the resolution that you just read to us was in response to that, was it not? A. That's correct.

Q. Namely, that the Faculty Council in a meeting assembled reaffirmed its position that the petition would be limited to full-time faculty members and whatever other full-time, librarians and others, but that wouldn't include part-timers?

* * * * *

85 Q. Were you here on May 17th? By "here" I mean in the National Labor Relations Board at 26 Federal Plaza on May 17, 1973? A. Yes.

Q. And at that time, Miss Grow, did not you agree through your counsel who was representing your organization at the time - let me at least finish my question before you interrupt - did you not agree through your counsel, who was present here, present in this hearing now and who was present at that meeting then, to include the part-time faculty members within the bargaining unit?

MR. SISSMAN: Objection.

* * * * *

86 MR. KRAMER: Mr. Hearing Officer, there is a reason why I am asking. Again I call your attention to the fact that this is a fronting case, as we see it. I don't expect my learned colleague to agree with me. But that's the case as we see it. And that here on May 9 the body votes in a group to reaffirm its position which it took on April 18th to exclude part-timers and then in the proceedings that we are having here, where this organization is represented by counsel that is being paid by an affiliate of the NYSUT under the advice of that counsel and in the presence of its paid field representative, Mr. Koozman, which we will show, it then changes and disregards the very vote of the body that supposedly that the counsel was representing and Miss Grow was representing, that's fronting in my book, Mr. Hearing Officer. If it isn't, it is for the Regional Director to decide whether it is or not.

* * * * *

88 HEARING OFFICER: Overruled.

Answer the question.

Q. Did you agree or didn't you? A. Yes.

Q. The petition was subsequently withdrawn, was it not, on that very day, May 17th? A. That's correct.

Q. And it was refiled again, was it not? A. That's correct.

Q. When did you refile it, so we have that in the record? A. May 17th.

Q. Actually bring it here that day, that same day? A. It was brought here that same day.

* * * * *

89 Q. On May 17th, Miss Grow, did you send a memo to the faculty?

A. That's correct.

Q. In that memo, Miss Grow, did you refer to the name Mercy College Faculty Council as the preferred, and I use that as a quote, "preferred" title of your organization? A. Well, if you are quoting from the piece of paper, yes.

Q. Preferred over what, Miss Grow? A. Preferred over the title above, preferred as far as the petition was concerned, to the title Mercy College Faculty Council (Affiliation pending NYSUT - NEA-AFT - AFL-CIO).

Q. That's the affiliation that you will have after the election, isn't it, Miss Grow?

MR. SISSMAN: Objection.

HEARING OFFICER: Sustained.

MR. KRAMER: Exception.

* * * * *

91 Q. Can you produce a letter from you or anyone else in authority in your Council, c-i-1, to counsel, s-e-1, authorizing him on behalf of Mercy College Faculty Council to include part-timers in the bargaining unit? A. No, I cannot.

Q. I show you Employer's Exhibit - correction, Petitioner's Exhibit 9 in evidence.

Did you have a conversation with Mr. Koozman concerning his use of the letterhead? A. I did not.

Q. Did you have a conversation with Mr. Koozman concerning the title that he styled himself by? A. No, I did not.

Q. Did you ever object to him using that letterhead in demand for recognition? A. No.

Q. Have you ever paid Mr. Koozman for any of the services — when I 92 say "you," you or your organization, of course — paid Mr. Koozman for any services he has rendered to you? A. No.

* * * * *

REDIRECT EXAMINATION

* * * * *

95 Q. At any time that you had meetings with the council was there ever any discussion about possible affiliations with any other teacher organizations other than New York State United Teacher? A. No.

96 Q. Was American Association of University Professors mentioned at all?

MR. KRAMER: The witness just testified no, as I recall.

A. At the meeting with counsel?

Q. I said "Council," I mean C-o-u-n-c-i-l.

At any meeting that you had where discussions of possible affiliations came up, meetings with the Mercy College Faculty Council, C-o-u-n-c-i-l, was the possibility of merger with an organization such as the American Association of University Professors discussed as one of the possibilities or options that would be available? A. That's correct.

Q. Was the Civil Service Employees Association ever mentioned as a possible organization? A. No, it wasn't.

Q. Were there any other organizations that were mentioned as possible?

A. NEA, I believe, was mentioned.

Q. National Education Association? A. Yes.

Q. Was the possibility of merger with the National Education Association

by itself discussed without affiliating with any other labor organization?

A. That's correct.

97 Q. At the time that Mr. Koozman — that you knew that Mr. Koozman was filing this application, the petition in the first case, and that he was signing it as Bernard Koozman, a field representative in behalf of Mercy College Faculty Council, affiliation pending, et cetera, was it your understanding that you were bound to affiliate with this organization? A. It was not.

Q. Was there ever any discussion had at the executive council, at the executive committee of the Mercy College Faculty Council that this would bind our organization to this type of affiliation? A. No, because it was clear that it would not.

* * * * *

Q. Did you have any understanding as a result of conversations with Bernard Koozman as to any reasons why it was being filed this way? A. Yes.

Q. What was that understanding? A. To identify him and to give a mailing address.

98 Q. As a matter of fact, the mailing address you gave today is the mailing address of the college, is that so? A. 555 Broadway.

Q. And I believe that we gave that mailing address at the outset of this hearing, is that so? A. Yes.

* * * * *

101 Q. Would you show me any place in the minutes of the meeting of May 9, 1973 where it states that the position of the Council with respect to the part-timers is negotiable? A. That's not contained in it.

Q. There is no statement to that effect, is there? A. No, there's not.

Q. And there is no limiting caveat in the motion of the body at that meeting, is there, as to allowing you to negotiate, it doesn't say that anywhere in there, does it?

* * * * *

A. We don't have the power to overrule a motion. I believe that we have the power to interrupt the negotiations and make a decision at the time.

Q. Miss Grow, I would like to have you look at the last sentence of the second section of Article 7 of your own by laws, if you would, which are in evidence as the Petitioner's Exhibit 1, which says that the Board, meaning the advisory board, shall be subject to the orders of the Council, and then continues, and none of its acts shall conflict with action taken by the whole council.

102 Would you like to reconsider your answer about whether you had authority to disregard the motion of May 9th as stated in the minutes – A. I believe we did, because the meeting the context of motion of May 9th was in terms of the membership, the definition of membership as it related to the bylaws, and it was a recognition that there was change, a slight change as far as the bargaining organization and the membership of the bargaining organization and the bylaws. And up until that point, we had gone ahead – I had interpreted for the Advisory Board who were also present at the meetings, and no challenge was ever raised from the floor as to the decisions we had made or were going to be making in this regard, and so that if it is not in writing, I think that it is de facto acceptance on the body of Faculty Council to delegate to us in this matter the kind of decisions that would have to be made as we tried to get an election date.

Q. Mis Grow, can you show me anything in the minutes of the May 9th 103 meeting or the minutes of any other meeting that delegates to you the authority to supersede the May 9, 1973 resoultion? A. No, I cannot.

* * * * *

104 MR. KRAMER: I would like you to answer whether you can show me anything in the minutes.

THE WITNESS: No.

Q. I show you Petitioner's Exhibit 11 in evidence, Miss Grow.

Did you receive this from — this envelope from Mr. Sissman? A. Yes, I did.

Q. There was a letter, I take it, in the envelope? A. Yes, there was.

Q. Without divulging the contents of the letter, because I don't want to know what the contents of the letter was, I would like you to, if you have it with you, to simply show us the letterhead.

MR. SISSMAN: Absolutely not.

MR. KRAMER: I just wonder who is running the hearing.

105

MR. SISSMAN: I object to anything in a letter. I indicated that I sent a letter. Anything in that letter is confidential and it is none of his business nor is it the business of anyone else what's in that letter. I simply offered the envelope as proof of mailing and asked her when she received it. In terms of the contents of

that letter, I think that is completely periphery and it is not for him to go into.

MR. KRAMER: The contents of the letter I am not interested in.

MR. SISSMAN: Anything that's on that letter includes what's printed on it.

HEARING OFFICER: Sustained. If Mr. Kramer —

MR. KRAMER: I can make an offer of proof, Mr. Hearing Officer, that the letterhead — that the letterhead would not be the letterhead — would not be the letterhead of Local 2334, for that matter, any other local of the New York State United Teachers and certainly not the local to which learned counsel referred as the local paying or — I don't remember the number of the local that counsel referred but our offer of proof is that that letterhead would not be under that local's letterhead, it would be a different letterhead and we think if we are allowed to explore we would be able to demonstrate that was the New York States Teachers Union letterhead.

HEARING OFFICER: Sustained. The letter was not introduced into evidence. If you desire to seek that letter, you can I imagine subpoena it or request it.

MR. KRAMER: We will appeal your ruling in the interim to the Regional Director and then we can have an interim appeal as I understand it.

106 HEARING OFFICER: You certainly can.

MR. KRAMER: Let me finish with the witness. She has been there a very long time.

MR. SISSMAN: Thank you.

MR. KRAMER: You're welcome.

Q. This envelope has the return address, New York State Union of Teachers, New York City office. A. New York State United Teachers, New York City office.

Q. By the way, have you any arrangement to pay the counsel, either Mr. Kaufman or Mr. Sissman, for disbursements they incur in connection with representing you in this proceeding and by you I mean your organization?

A. No, I do not.

Q. Do you know who paid the postage on that letter? A. No, I do not.

Q. Let's turn to the meetings where you stated there were discussions of affiliation with AAUP, NEA, what kind of meetings were they? Meetings to which Mr. Sissman inquired on your redirect examination? A. Faculty Council meetings.

Q. When did those meetings take place? A. There are two that I recall. At one was the meeting at which Mr. Cantor came and he mentioned the AAUP as an affiliation. Another was the meeting at which the discussion had been raised at the time as to having a representative come and as some mem-

107 bers of the faculty said, well, perhaps we should have also a representative come from the AAUP. That was part of the discussion, as I recall it. But there was no motion made to that effect nor has there been one since.

Q. And a motion would be required to invite someone to a meeting, wouldn't it? A. That's correct.

Q. Your body operates by means of motions, does it not?

A. Parliamentary procedures.

Q. And your board is governed by the motion that your body makes, does it not? A. That's correct.

* * * * *

112 HEARING OFFICER: On the record.

During an off-the-record discussion, the parties tried to arrange the next dates for the next session of this hearing.

It was agreed that the parties could not meet prior to Friday, June 15th. At that time, Friday, June 15th, we will begin with the litigation of this issue of the correct title of the petitioner, and we will further seek stipulations on questions concerning representation appropriate bargaining unit, which includes the question of the status of the chief librarian and two part-time librarians.

* * * * *

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Second Region

In the Matter of:)
MERCY COLLEGE)
Employer) Case No. 2-RC-16181
and)
MERCY COLLEGE FACULTY COUNCIL)
Petitioner)

26 Federal Plaza,
New York, New York
Friday, June 15, 1973

The above-entitled matter came on for further hearing, pursuant to adjournment, at 11:15 a.m.

BEFORE:

HOWARD SHAPIRO, Hearing Officer.

APPEARANCES:

SAUL KRAMER, ESQ.

Proskauer, Rose, Goetz & Mendershon,
Esqs., 300 Park Avenue, New York,
New York, appearing on behalf of the
Employer.

JACK J. SISSMAN, ESQ.

Eugene M. Kaufman, Esq., 260 Park
Avenue, New York, New York, appear-
ing on behalf of the Petitioner.

PROCEEDINGS

HEARING OFFICER SHAPIRO: On the record.

This is a resumption of the formal hearing in the matter of Mercy College, Case No. 2-RC-16181, before the National Labor Relations Board.

The Hearing Officer appearing for the National Labor Relations Board is Howard Shapiro.

Will the representatives of the parties please state their appearances for the record.

For the petitioner?

MR. SISMAN: Eugene M. Kaufman, 260 Park Avenue South, New York City 11010, by Jack J. Sissman, same address.

HEARING OFFICER: For the employer?

MR. KRAMER: Saul G. Kramer, Proskauer, Rose, Goetz & Mendelsohn, 300 Park Avenue, New York, New York 10022.

HEARING OFFICER: At this time I would like to call Dr. Grow back to the stand for a few brief questions on labor organization.

* * * *

ANN GROW

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

EXAMINATION

117 Q. (By the Hearing Officer) Will you state the true and complete name of the petitioner? A. Mercy College Faculty Council.

Q. Is there any affiliation? A. No, there is not.

Q. What's the purpose of the organization? A. The purpose of the organization is to enable the faculty to work toward — to have an organization through which it can work toward a unified reasonable position in issues of faculty benefits and working conditions and salary and its role in curriculum and various other educational policy.

Q. Dr. Grow, are employees permitted to participate in the organization?

A. What do you mean by "employees"?

Q. The members of the faculty. A. Oh, yes.

* * * *

118 HEARING OFFICER: On the record.

* * * *

Concerning Mr. Kramer's appeal of my ruling regarding the letter contained in Petitioner's Exhibit No. 11, upon reconsideration, I would allow Mr. Kramer to continue his inquiry into that line.

* * * * *

119 Q. (By Mr. Kramer) Dr. Grow, I show you the question on line 13 of page 104 of the record and ask you, now having read that question, whether the document you have before you is the letterhead referred to in the question?

120 MR. SISSMAN: Repeat the question so I know what you are referring to. Page 104, what line?

* * * * *

MR. KRAMER: Line 13, referring to line 13, where it says, "Without divulging the contents of the letter, because I don't want to know what the contents of the letter was, I would like you to, if you have it with you, to simply show us the letterhead."

HEARING OFFICER: Mr. Kramer, which question are you asking of her?

MR. KRAMER: I am asking her if this document before her is the letterhead that's referred to in the question on 104, line 13.

THE WITNESS: Yes.

121 * * * * *

Let me have this marked for identification as Employer's Exhibit No. 1. You are offering this document into evidence?

MR. SISSMAN: I would like to make it a Joint exhibit.

MR. KRAMER: I am offering it as an employer's exhibit.

MR. SISSMAN: I was prepared to stipulate that the letter sent to Dr. Grow was on the letterhead of the New York State United Teachers.

MR. KRAMER: The record on page 104, et seq., establishes the position of Mr. Sissman quite clearly.

* * * * *

122

HEARING OFFICER: Mr. Kramer, continue.

Q. (By Mr. Kramer) Miss Grow, did you ever write Mr. Sissman a letter retaining him on behalf of the association? A. No, I did not.

Q. Did you ever write him concerning what positions he was to take in these proceedings? A. I beg your pardon? I am having difficulty hearing.

Q. Did you ever write him concerning what positions he was to take?

126

* * * * *

The parties stated that they agreed to exclude deans even if they are members of the faculty.

Is that correct, Mr. Sissman?

MR. SISSMAN: Yes.

HEARING OFFICER: Is that correct, Mr. Kramer?

MR. KRAMER: That's correct.

HEARING OFFICER: Okay.

That would also apply to assistant deans, Mr. Hearing Officer, if they are members of the faculty.

MR. SISSMAN: It would apply to all the excluded managerial and administrative personnel who happen to be members of the faculty.

127

MR. KRAMER: That's quite correct and removes any ambiguity.

MR. SISSMAN: Right.

PETITIONERS EXHIBIT 1

*BY-LAWS OF
MERCY COLLEGE FACULTY COUNCIL

ARTICLE I

Name

The name of the society shall be the Mercy College Faculty Council.

ARTICLE II

Object

The object of this autonomous council is to protect and enhance the interests of the Mercy College Faculty as determined by that body.

ARTICLE III

Members

All persons carrying a teaching load of six hours or more at Mercy College are members of this Council. Persons carrying a letter of appointment to teach less than six hours are associate members with one-half vote.

ARTICLE IV

Officers

Section 1. The officers of the Council shall be a President, a Secretary, a Treasurer, and three elected members of an Advisory Board.

Section 2. Officers shall be elected by ballot at the first regular meeting of the Council during the Spring Semester and shall serve for one year. Nominations for office shall be made from the floor at this meeting.

Section 3. These officers shall perform the duties prescribed by these By-laws and by the parliamentary authority adopted by the Council.

ARTICLE V

Meetings

Section 1. The regular meetings of the Council shall be one in September and one in February and one other time during each semester on dates decided upon by the Advisory Board and announced to the membership before the beginning of each semester. Changes in this schedule can be made by a majority of the members present and voting at a Council meeting.

* As adopted by the Faculty of Mercy College, October 4, 1972.

* * * * *

PETITIONERS' EXHIBIT 2

Professional Staff Congress City University of New York

25 West 43rd Street, Suite 620
New York, New York 10036
212/354-1252

Belle Zeller, President
Israel Kugler, Deputy President
Arnold Cantor, Executive Director

Ann E. Grow,
President, Faculty Council
Mercy College
555 Broadway
Dobbs Ferry, N.Y. 10522

April 25, 1973

Dear Professor Grow:

I am writing to find out if you have received the desired information from NYSUT as well as the assistance you asked for in order to get "organized".

Please let me know if I can help.

Sincerely,
/s/ ARNOLD CANTOR
Arnold Cantor
Executive Director

AC:SM

opeiu #153

afl-cio

PETITIONERS' EXHIBIT 3

AUTHORIZATION & DESIGNATION

Name _____ Date _____

School _____ Position _____

Home Address _____ Telephone _____

I hereby designate and authorize Mercy College Faculty Council its agents or representatives, to act for me pursuant to the National Labor Relations Act & the Taft-Hartley Act as amended, as my exclusive agent and representative for the purposes of collective negotiations with respect to terms & conditions of employment, the negotiation of collective agreement, and any questions arising thereunder; and I hereby revoke every other designation or authorization, if any, previously made by me for such purposes.

Signature _____

Witness _____

Local Association Representative

PETITIONERS' EXHIBIT 4A

April 18, 1973

MEMORANDUM

To: Members of Faculty

From: Faculty Council Advisory Board

Enclosed is an AUTHORIZATION AND DESIGNATION form.

It is to be filled out for the purpose of establishing a showing of interest and of petitioning the National Labor Relations Board.

The form is *strictly confidential*; and no one will have access to them other than the N.L.R.B.

In addition, you will find a supply of membership applications that will provide for our organization to affiliate with both state and national organizations. Do *not* return this pink form as yet.

Re: White Form

"Authorization & Designation"

Please insert the following in the blank offered for the name of the organization:

MERCY COLLEGE FACULTY COUNCIL

Then, after signing, please return in the sealed envelope to either

Mavis Gill

or

Mary Wootten

by Tuesday, April 24.

PETITIONERS' EXHIBIT 4B

PLEASE
PRINT
FIRMLY

Cromwell Business Forms, Albany, N.Y. 12201



UNITED TEACHING PROFESSION ENROLLMENT
New York Congress of Teachers, Inc., 30 Wolf Rd., Albany, N.Y. 12205
 AFFILIATED WITH
AMERICAN FEDERATION OF TEACHERS (AFL-CIO) NATIONAL EDUCATION ASSOCIATION (WCOTP)



LAST NAME	FIRST	INITIAL
STREET ADDRESS OR BOX NO.		TELEPHONE
CITY OR VILLAGE	STATE	ZIP CODE

SOCIAL SECURITY NUMBER
DISTRICT OR INSTITUTION
BUILDING NAME

I hereby apply for membership.

SIGNATURE

DUES MUST BE REMITTED THROUGH THE LOCAL UNIT.

COLLECTOR'S SIGNATURE

DATE

A. THIS COPY TO NYCT

DUES WILL BE PAID BY PAYROLL DEDUCTION
 CASH

CHECK HERE TO ADD AFT MEMBERSHIP

CHECK IF NEA LIFE MEMBER *

*RATE FOR NEA LIFE IF NOT PAID UP \$ _____

MEMBERSHIP IN YOUR UNITED TEACHING PROFESSION

The New York Congress of Teachers was formed by the consolidation of New York State Teachers Association and United Teachers of New York. NYCT will maintain affiliation with both American Federation of Teachers (AFL-CIO) and National Education Association (WCOTP). Membership at the State and National levels must come through a local unit. The only exception to this rule is in the case of retired teachers, who can join NYCT as Special members on a direct basis.

NEW YORK CONGRESS OF TEACHERS

ACTIVE — Active membership in the Congress is open to any person, except chief school administrators, who engages in the practice of teaching or who performs educational duties in New York State and, further, who is a member in good standing of the NEA, AFT and NYCT recognized local for which he is eligible. Such membership shall be availed only through the local unit, anyone excluded from membership in the NEA or AFT by the constitution or by-laws of either organization will be exempt from membership in that national organization. Active membership dues for the 1972-73 year are \$55.00. **SPECIAL** — Local may establish a special class of members which shall consist of retired teachers and/or part-time teachers. Where no local membership is available, retired teachers may join the Congress on a direct basis. Special membership dues for the 1972-73 year are \$27.50. **NOTE:** The Congress also has At Large and Student membership. For information on these classes of membership, contact the NYCT Membership Division.

NATIONAL EDUCATION ASSOCIATION

ACTIVE — Any person actively engaged in educational service of a professional nature is eligible to become an Active member of NEA if he (1) has an earned bachelor's degree or higher degree or holds a regular vocational or technical certificate and, (2) where required, holds or is eligible to hold a regular legal certificate of any kind except an emergency substitute certificate. The annual dues for Active members are \$25.00.

ASSOCIATE — Any person interested in advancing the cause of education but who is not eligible for Active membership may become an Associate member. The annual dues for Associate members are \$25.00.

AUXILIARY PERSONNEL — Any person who is employed in school systems and who directly or indirectly assists the professional personnel to provide improved educational opportunities may become an Auxiliary Personnel member. The annual dues for Auxiliary Personnel members are \$10.00.

LIFE MEMBERSHIP — Information about NEA Life membership may be obtained by writing the NYCT Membership Division.

AMERICAN FEDERATION OF TEACHERS (AFL-CIO)

The American Federation of Teachers consists of federations of public and private school teachers and other educational workers, organized in conformity with the AFT constitution. Their member organizations pay an annual per capita for their individual members. The per capita for Active membership is \$19.00, the per capita for Special membership is \$2.00.

PETITIONERS' EXHIBIT 5

Form NLRB-502
(11-64)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
PETITIONForm Approved
Budget Bureau No. 64 R00214INSTRUCTIONS—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.DO NOT WRITE IN THIS SPACE
CASE NO.
2-RC-11158
DATE FILED
8/14/73

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (Check one) AC (Act) RM (Representation Petition) RD (Decertification) UD (Union Shop Authority) LC (License Clarification) AC (Amendment of Certification)
Below the statement following the description of the type of petition shall not be deemed made.

(Check one)

RE-CERTIFICATION OF REPRESENTATIVE—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

RM-REPRESENTATION (EMPLOYER PETITION)—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

RD-DECERTIFICATION—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

UD-UNION SHOP AUTHORITY—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

LC-LICENSE CLARIFICATION—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one) In unit not previously certified In unit previously certified in Case No. _____

AC-AMENDMENT OF CERTIFICATION—Petitioner seeks amendment of certification issued in Case No. _____

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER **Mercy College** EMPLOYER REPRESENTATIVE TO CONTACT **Dr. Donald Grunewald** PHONE NO **914**
OW 3-45003. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)
555 Broadway, Dobbs Ferry, New York 105224a. TYPE OF ESTABLISHMENT (Check one, where applicable)
College 4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Education5. Unit Involved (In UC please describe PRESENT bargaining unit and attach description of proposed classification)
Included **All Full time Members of Faculty of Instruction and Librarians** DA. NUMBER OF EMPLOYEES IN UNIT
PRESENT **62**
PROPOSED (BY UC/AC) _____Excluded
President, Deans and Assistant Deans, Directors and Assistant Directors of Academic Advisors
Assistants to the President
If you have checked box B in 1 above, check and complete EITHER item "a" or "b" whichever is applicable
a. Request for recognition as Bargaining Representative was made on **April 30, 1973** (Month, day, year)
and Employer declined recognition on or about **May 3, 1973** (Month, day, year)
b. Petitioner is currently recognized as Bargaining Representative and desires certification under the act.6b. IS THIS PETITION
SUPPORTED BY
30% OR MORE
OF THE EMPLOYEES
IN THE UNIT?
 YES NO
*Not applicable in
RM, LC and AC7a. Request for recognition as Bargaining Representative was made on **April 30, 1973** (Month, day, year)
and Employer7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the act.8. Recognized or Certified bargaining Agent (If there is none, so state)

NAME _____ AFFILIATION _____

ADDRESS _____ DATE OF RECOGNITION OR CERTIFICATION _____

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year) 10. IF YOU HAVE CHECKED BOX 6 IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR Picketing AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES **NO** 11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF (Insert name) A LABOR ORGANIZATION, IF ANY

ORGANIZATION, IF ANY (Insert address) SINCE (Month, day, year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c) WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 4a, IF ANY, TO STATE

NAME _____ AFFILIATION _____ ADDRESS _____ DATE OF CLAIM
(Required only if
Petition is filed
by employer)

None _____

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief
Mercy College Faculty Council (Affiliation Pending - NYSUT-NEA/AFT-AFL-CIO)
(Petitioner and affiliation, if any)By: *Donald Grunewald* Field Representative
(Signature of representative or person filing petition)
Address: **101 Executive Boulevard, Elmsford, N.Y. 10523** (Street and number, city, state and ZIP Code) (914) 592-4411
(Telephone number)

WILLFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PETITIONERS' EXHIBIT 6

May 1, 1973

MEMORANDUM

TO: Members of the Faculty
FROM: Ann Grow, President of Faculty Council

Please note copy of letter sent to Dr. Grunewald on behalf of the Faculty Council. We received 46 (of 62 eligible voters) favorable petitions indicating the desire for recognition. This represents 74% of the eligible members. Contrary to Dr. Grunewald's memorandum of April 30, 1973, the Faculty Council is not at this time requesting representation by the "New York Congress of Teachers" (if such an organization exists), or any other organization. The question of affiliation is one we have not yet answered for ourselves.

Bernard Koozman has been assigned by the New York State United Teachers to assist us in achieving Certification of the Faculty Council. We have no commitment to him or to the NYSUT at this time.

When the time comes for Step 2, namely, affiliation with an outside organization that would provide for the faculty legal counsel and professional advice comparable to that which Mercy College is providing for the Office of the President, the entire Faculty will be consulted by the Faculty Council precisely as it was recently done for Step 1.

[Printing Note: Petitioner's Exhibit 9 was also attached as part of this exhibit.]

PETITIONER'S EXHIBIT 9

NYSUT

New York State United Teachers

Elmsford Service Center
101 Executive Boulevard
Elmsford, New York 10523
914-592-4411

April 30, 1973

Dr. Donald Grunewald, President
Mercy College
555 Broadway
Dobbs Ferry, New York 10522

Dear Dr. Grunewald:

Please be informed that the Mercy College Faculty Council represents a majority of all full time members of the Faculty of Instruction and Librarians at Mercy College, Dobbs Ferry, New York 10522.

We therefore request that you recognize the above named Council.

Very truly yours,

/s/ BERNARD KOOZMAN

Bernard Koozman

Field Representative

BK:lev

cc: Dr. Ann Grow

EMPLOYER'S EXHIBIT NO. 1

Co-General Counsel
Bernard F. Ashe
Eugene M. Kaufman

Co-Deputy Counsel
Stephen A. Perelson
James A. Sandner

NATIONAL LABOR RELATIONS BOARD
Docket No. ENP-1 OFFICIAL EXHIBIT NO. ENP-1

Disposition File ✓
Rec. ✓
In the matter of Merger ENP
Date 4/15/50 Witness ENP Reporter ENP
No. Pages

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

* * * * *

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Howard Shapiro, a Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the Regional Director, Region 2.

Upon the entire record in this case, it is found that:

1. Mercy College is a private, non-profit college located at 555 Broadway, Dobbs Ferry, New York. During the past year the college derived gross revenues from tuition fees in excess of \$1,000,000 of which in excess of \$50,000 was received directly from outside New York State. Based on the record and a stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.²

2. The Employer alleges that the name by which Petitioner has designated itself is incomplete and misleading and substantially for that reason the Employer refused to stipulate that Petitioner is a labor organization within the

¹ The Employer's motion made at the end of the hearing to transfer the case to the Board for decision on the ground that the issue concerning Petitioner's name, discussed more fully below, is a matter of first impression, properly was referred to the Regional Director. The Employer does not refer to anything in the Act or the Board's Rules and Regulations circumscribing my authority to decide this case and as I do not consider the issue involved as raising a substantial question of law or policy which would warrant a transfer of the case I deny the motion.

² *Cornell University*, 183 NLRB No. 41.

meaning of the Act. According to the Employer, the correct name of Petitioner, and one by which it should be designated on the ballot, is "Mercy College Faculty Council (Affiliation Pending - NYSUT-NEA/AFT-AFL-CIO)."³ Coupled to this contention is the further argument that Petitioner is a "front" for NYSUT. However, the Employer does not seek dismissal of the petition and apparently raises the "fronting" issue to support its request that Petitioner's name be "corrected."

In support of its position the Employer points to certain matters in the record which are not seriously in dispute. On May 4, 1973, a petition was filed in Case No. 2-RC-16168 by Bernard Koozman, field representative, naming the petitioner as "Mercy College Faculty Council (Affiliation Pending - NYSUT-NEA/AFT-AFL-CIO)." This petition subsequently was withdrawn and the petition herein, signed by Ann E. Grow as President of Mercy College Faculty Council, was filed on May 17, 1973. Additionally, the Employer relies on certain forms of assistance and advice rendered to Petitioner by NYSUT. Thus, a speaker from the Professional Staff Congress, City University of New York⁴, gave advice on organizational problems to Petitioner; Koozman, named

³ The letters stand for New York State United Teachers - National Educational Association/American Federation of Teachers - AFL-CIO, hereinafter also referred to as NYSUT. However the record is devoid of information to indicate what connections or affiliations, if any, exist between these various organizations. Another labor organization UFT (United Federation of Teachers) also appears to have been involved as set forth below.

⁴ The record establishes that this organization is affiliated with NYSUT and in part at least exists for the purpose of assisting fledgling teacher groups, such as Petitioner, in their attempts to secure union representation.

above, furnished Petitioner with authorization and designation forms⁵ in about April 1973, sent a letter on NYSUT stationery in April 1973 requesting that the Employer recognize Petitioner, filed the earlier petition noted above and generally assisted and advised Petitioner on various matters; and the legal assistance in this proceeding was donated by UFT, Local 2, AFT, AFL-CIO, an affiliate of NYSUT.

The record further contains testimony by Petitioner's president that Petitioner was organized in the summer of 1972, prior to and without any assistance by NYSUT, that its name as set forth on the petition herein was included in its original by-laws, and it never has had any other name. The president also stated that the membership was informed that it was not affiliating with any other labor organization at this time nor in fact has Petitioner made any application to NYSUT for affiliation.⁶ This witness testified, without contradiction, that Petitioner's correct and only name is Mercy College Faculty Council, and that it exists for the purpose of dealing with the Employer concerning terms and conditions of employment and that it admits faculty employees of the Employer to membership.

Based on the foregoing, and on the record as a whole, I find that the Employer has failed to support its contention that Petitioner's name is incorrect or misleading. No justification exists at this time for requiring Petitioner to add to its name words to the effect that it is in process of

⁵ These are mimeographed union designation forms and although they were pre-printed, a blank space was left for the name of the union to be designated as representative. In some cases Petitioner's name was inserted prior to distribution to faculty members but in no case was any other name used.

⁶ Counsel for Petitioner stated that while no application for affiliation with NYSUT had been made an affiliation nevertheless was "pending." In its brief, the Employer contends that counsel's statement is a concession that affiliation actively is being sought. It is clear from the record, however, that counsel's remark was used in the dictionary sense of the word and was intended only to convey the impression that the question of affiliation had yet to be decided or determined.

affiliating with some other organization, an action its membership has not and may never authorize. Nor is there any substance to the Employer's allegation that Petitioner, which was independently formed, with its own officers, constitution and by-laws and which is structured and administered independent of NYSUT, is a "front" for NYSUT merely because it sought and accepted assistance from that group in its efforts to secure recognition from the Employer.

Accordingly, I find that Petitioner's correct name is Mercy College Faculty Council, that it is a labor organization within the meaning of Section 2(5) of the Act, and that it claims to represent certain employees of the Employer.⁷

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The parties agreed that the appropriate unit should include all full time and regular part time⁸ members of the faculty including department chairmen, assistant library director and reader services librarians⁹ and excluding

⁷ While the cases cited by the Employer in its brief generally recognize the Board's obligation to insure that a particular name used by a union does not confuse employees in their choice of a bargaining representative, it also appears that the Board allows unions considerable leeway in choosing the name by which they so designate themselves. Indeed, in no case cited by the Employer did the Board require a union to alter or change its name. In *Allis-Chalmers Manufacturing Company*, 62 NLRB 995, the Board, in considering a claim that the petitioner intended to transfer its certification should it win the election, noted that "any question which may arise as to a change in the affiliation or identity of the certified organization, requiring amendment of the certification, must be raised in appropriate supplemental proceedings . . ." Such comment applies to the kind of situation the Employer seems to anticipate in this case. Other cases cited by the Employer are not factually appropriate or relevant to the issues herein presented.

⁸ The parties agreed that part time faculty members are defined as those who are teaching part time at the College in the fall of 1973 who also have taught at least one semester in the prior academic year (fall 1972 - spring 1973), and those teaching in the business department in the fall of 1973 who also taught in one or more of the summer sessions in 1973. As this agreement is in accord with Board policy in university cases it shall be adopted for the determination of eligibility in the unit. *The Catholic University of America*, 201 NLRB No. 145.

⁹ The parties stipulated that all other employees working in the library were non-faculty members and therefore should be excluded.

all other employees, administrative personnel, the president, assistants to the President, deans and assistant deans, directors and assistant directors of academic advisors, guards and supervisors. There is no history of collective bargaining for these employees.

The only disputed inclusion is that of the Director of the Library, Samuel C. Cook, whom the Employer, contrary to Petitioner, would exclude as a supervisor. The library staff consists of Cook and seven others, three of whom the parties agree to include in the unit as they are also faculty members, and four of whom are excluded by agreement.¹⁰ There are also eight to ten student aides working in the library.

The uncontradicted testimony establishes that Cook responsibly directs the work of librarians, has effectively recommended the hiring of employees, and the granting of raises, has on his own hired and fired other employees, scheduled their work, and has authority to give time off. Cook on his own arranged for a consultant to make recommendations for improvements in the library. He reports directly to the Academic Dean of the College. As it is clear that Cook has all the indicia of a supervisor he shall be excluded from the unit.¹¹

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

¹⁰ Though the testimony in the record does not reveal the professional status of these employees The Mercy College Catalogue discloses that these four members of the library staff do not have the professional degrees which the included librarians have. Therefore I shall exclude them from the unit of professional employees.

¹¹ *C.W. Post Center of Long Island University*, 189 NLRB No. 109.

All full time and regular part time members of the faculty employed by the Employer including department chairmen, assistant library director and reader services librarians but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.

5. In accordance with the agreement of the parties, I shall not direct that an election be held at this time but shall direct that it be held after the commencement of classes for the fall term at the College, at a date to be determined by the Regional Director, Region 2, among the employees in the appropriate unit who are employed during the payroll period immediately preceding the date of issuance of a Notice of Election.¹²

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the Regional Director for Region 2 among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been

¹² *Fordham University*, 193 NLRB 134.

discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.¹³ Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Mercy College Faculty Council.¹⁴

Dated: July 12, 1973

at New York, New York

/s/WINIFRED D. MORIO

Winifred D. Morio, Acting Regional
Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

¹³ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it hereby is directed that an election eligibility list containing the names and addresses of all eligible voters, must be filed by the Employer with the Regional Director, Region 2 within 7 days of the date of issuance of the Notice of Election. The Regional Director will make the list available to all parties to the election. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

¹⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by July 25, 1973.

REGION 2 GSA FTRC
NLRB

AUG 3 2 51 PM '73

173-113 3 PM 3:03

RAAUIJHZ RUEVDELO0005 2142045-UUUU--RUEVDAE.

FM ROBERT VOLGER DEPUTY EXEC SECY WASHDC NLRB

TO RUEVDAE/3/SAUL G KRAMER PROSKAUER ROSE GOETZ AND MENDELSON 300

PARK AVE NY NY

TO RUEVDAE/3/JACK J SISSMAN EUGENE M KAUFMAN 260 PARK AVE SOUTH NY NY

TO RUEVDAE/3/NLRB NY NY []

SI.

RE: MERCY COLLEGE 2-RC-16161 EMPLOYERS REQUEST FOR REVIEW OF
ACTING REG'L DIR DECISION AND DIRECTION OF ELECTION IS HEREBY
DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW.
BY DIRECTION OF THE BOARD.

BT

NNNN

Form 5-13-70
(2-64)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

7-7-73

MERCY COLLEGE Employer		Case No. 2-RC-16161 Date Filed 5-17-73
and		Date Issued November 7, 1973
MERCY COLLEGE FACULTY COUNCIL Petitioner		Type of Election: (Check one) <input type="checkbox"/> Stipulation <input type="checkbox"/> Sec'y Direction <input type="checkbox"/> Consent Agreement <input type="checkbox"/> RD Direction <i>(If applicable check either or both)</i>
		<input type="checkbox"/> 5(b) (7) <input type="checkbox"/> Mail Ballot
		Incumbent Union(Code) <u>None</u>

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	<u>85</u>
2. Void ballots	<u>0</u>
3. Votes cast for	<u>PETITIONER</u> <u>42</u>
4. UNION MEMBER	
5. UNION MEMBER	
6. Votes cast against participating labor organization(s)	<u>47</u>
7. Valid votes counted (sum of 3, 4, 5 and 6)	<u>53</u>
8. Challenges	<u>3</u>
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	<u>56</u>
10. Challenges sufficient to affect the results of the election	
11. The agent certifies that these votes cast for petitioned for labor organization(s) has (not) been cast for CHALLENGED OR DETERMINATIVE	

For the Regional Director

Henry J. Hayes

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For <u>EMPLOYER</u>	For <u>PETITIONER</u>
<u>RECEIVED 5-17-73</u>	
For	

* * * * *
EMPLOYER'S OBJECTIONS

Mercy College does hereby object to the conduct of the election held in the above-captioned matter on November 7 and 8, 1973, as more fully described below:

1. A ballot blacked in the "No" box and marked with an "X" in the "Yes" box was counted as a "Yes" vote when it should have been treated as void. The blacking in of the "No" box in the fashion that appears on the ballot establishes the voter's intention to vote "No". And, at the very least, would be so ambiguous as to require that the ballot be marked void.
2. Although counsel for the Employer challenged the aforesaid ballot at the time the votes were counted, the Board Agent improperly refused to treat that ballot as challenged vote.
3. On November 6, 1973, Mercy College Faculty Council distributed the sample ballot attached hereto as Exhibit A. The distribution of this ballot, which does not accurately reflect the ballot used by the Board, requires that the election be set aside.
4. On information and belief, at the Mercy College Faculty Council membership meeting held on or about November 1, 1973, and at other times thereafter, it was alleged in words or substance by officers and/or agents of the Mercy College Faculty Council that Mercy College maintained a hidden fund from which additional faculty salary increases would be taken if the Council were certified. No such hidden fund has been or is being maintained and assertions to the contrary by officers and/or agents of the Mercy College Faculty Council constitute material misrepresentation of fact that require that the election be set aside.
5. On or about November 1, 1973, members of the voting unit received the memorandum that is attached hereto as Exhibit B. This memorandum contained several material misrepresentations of fact, any one of which requires that the election be set aside, to wit:
 - A. The members of the unit were advised that "for the very first time you will have some say in what goes into your contract." Since at least

the Spring of 1969, members of the voting unit have in fact had "some say in what goes into" their contracts.

B. The Mercy College Faculty Council mischaracterized the Decision and Direction of Election of the Regional Director in this case.

C. The Mercy College Faculty Council quoted the Decision and Determination of the Regional Director out of context, thus materially misrepresenting same.

D. The Mercy College Faculty Council in the paragraph it quoted from the Regional Director's Decision and Determination excised portions thereof, thus materially misrepresenting the statements made therein.

E. The Mercy College Faculty Council asserted that "virtually everyone teaching at Mercy is automatically a member by the terms of the By-Laws of the organization." The fact is that the By-Laws provide that "[a]ll persons carrying a teaching load of 6 hours or more at Mercy College are members of this Council. Persons carrying a letter of appointment to teach less than 6 hours [i.e., administrators] are associate members with one-half vote." To be a voting members of the Mercy College Faculty Council, employees have to pay the dues for the current academic year. Part-time faculty members who are not administrators and who teach less than 6 hours were and are excluded from membership in the Mercy College Faculty Council and these excluded personnel constituted approximately 15% of the voting unit. The omission of the facts noted above constituted a material misrepresentation.

F. The Mercy College Faculty Council propounded the following question and answer which materially misrepresented the facts:

"Q. — Will a 'Yes' vote change the existing status of such basic things as tenure, the probationary period, etc.?

A. — No. All matters of faculty rights, status, benefits, etc., would become part

of the content of a legally binding contract with any abridgement subject to legal redress.

* * *

While the matters referred to above would to the extent required by law become the subject of collective bargaining, there is no legal requirement, as the Mercy College Faculty Council implies, that they "would become part of the content of a legally binding contract with any abridgement subject to legal redress."

G. The Mercy College Faculty Council materially misrepresented the facts by propounding the following question and answer:

"Q. — What if it came to the extreme situation of a strike, would I have to participate, picket, etc.?

A. — We cannot imagine this administration, or any future administration, interested in pushing matters to that extreme. In any case, strikes can never be called unless you, the members of the bargaining unit, vote for it."

The record in the representation case demonstrates that the Advisorv Board of the Mercy College Faculty Council has authority to disregard the wishes of the membership and there is nothing in the By-Laws of that Labor organization which restricts strikes to those situations in which the members of the bargaining unit have voted therefor. Further, the law is that a labor organization may lawfully fine its members for failure to participate in a strike.

4. On or about November 5, 1973, the Mercy College Faculty Council had the handbill attached hereto at Exhibit C in the College put in the mail boxes of the members of the voting unit. This handbill, in pertinent part, stated:

"Also, many of us remember that outside accrediting agencies, such as Middle States, have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision-making - 'authoritarian' was their word."

The statement of the Middle States Association referred to in Exhibit C is attached hereto as Exhibit D. The quotation set forth above materially misrepresents the comments of the Middle States Association.

WHEREFORE, Mercy College requests:

1. That the tally of ballots be revised to reflect the vote of 42 No - 41 yes, or, in the alternative, a vote of 41 No - 41 Yes, and that a certification be issued to the effect that no labor organization was certified in the election; or
2. That it be declared that the laboratory conditions that are required by the Board did not in fact exist because of any one or more of the aforesaid material misrepresentations of fact or other wrongful acts and that another election be directed.

Respectfully submitted,

/s/ SAUL G. KRAMER

Saul G. Kramer

Proskauer Rose Goetz & Mendelsohn

Attorneys for Mercy College

300 Park Avenue

New York, N.Y. 10022

Dated: New York, N.Y.

November 13, 1973

EXHIBIT 2

November 4, 1973

MEMORANDUM

TO: Members of the Faculty

FROM: Advisory Board of the Mercy College Faculty Council

We are urging all faculty members to vote "YES" in the upcoming election to provide legal bargaining status for your Faculty Council Organization.

Past experience at Mercy teaches us that it is very important that our faculty express itself collectively. In the last five years we have seen a complete turnover of students, of course, but also, three separate administrations and at least a 50% turnover of members of the Board of Trustees. It is the faculty that represents the stable element of continuity for Mercy.

Also, many of us remember that outside accrediting agencies, such as Middle States, have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision-making—"authoritation" was their word.

Moreover, you may remember that we have tried the idea of a collegial Senate and it failed of support largely over the issue of its built in administrative veto power. We wonder if we can really hope for any better results from the administration's new governance proposals unless there is united faculty support to insure that a reasonable distribution of authority will ensue.

It was largely out of this background that you voted in a regular Faculty Meeting in May, 1972 to establish a committee to seek some alternative solution to Marcy's problems. By September 1972, that committee considered and rejected the idea of seeking affiliation with a union and proposed instead that you establish what came to be called the Mercy College Faculty

Council. After openly debating each item through 1972-73 the Faculty successively voted to accept the proposed by-laws, voted for its leadership, voted to hear a speaker to get information about unions, and voted to instruct its officers to pursue the steps to N.L.R.B. recognition for your Council. Now you will be voting for formal, legally binding bargaining status for your organization.

You have no doubt received a letter from Dr. Grunewald that insists that the basic issue is faculty affiliation with an outside union. While everyone knows that that is not the issue you will be voting for or against this coming Wednesday and Thursday, if that does become the next step, once again you will be the one to determine the matter.

The faculty at Mercy knows that they have long sought a workable and enforceable collegial structure to secure ~~its~~ benefits, working conditions, and an academic voice in our college. The alternatives have been to no avail.

Many of our newer associates may still feel they do not have enough background information to justify participation in this election. We recognize this as a perfectly reasonable position to take. However, we would urge you to seek out any Advisory Board member for such further information that you feel necessary to justify your joining with your colleagues to produce an overwhelming "Yes" vote.

We believe it is imperative to the long term interest of Mercy College as an institution that a united faculty acts now to strengthen and perpetuate the collegial, reasoned approach to our present problems. We feel this is both inherent in the nature of a Liberal Arts Institution and of primary concern to the faculty of Mercy College.

We urge you to vote "YES".

EXHIBIT 3

* * * * *

March 25, 1968

Sister Etheldreda Christie, President
The Trustees and Faculty
Mercy College
555 Broadway
Dobbs Ferry, New York

Dear Sister Etheldreda, Trustees, and Faculty,

Since combining a Case Study with evaluation for initial accreditation is unique, Taylor Jones suggested that I present my conclusions as observer in a letter to you, using the first person.

Since this is a progress report, it will focus on the problems pointed out and suggestions made by the evaluation team that visited the College in the Spring of 1967. Sister Mary Albert, the second observer, and I concur in the opinions expressed in this letter. While Dean Heller, as director of the Case Study, was not officially involved in the evaluation process, we consulted with him frequently, and our judgments have his support.

First of all, please accept our congratulations for the excellent way the College presented itself during the Case Study. From your formal papers, informal talks, and dialogue with the participants, it is clear that for Mercy College the past year has been a time of clarification and consolidation. The College has tackled every problem that concerned the visitors in 1967 and has made commendable progress. Consideration has also been given to all suggestions in the 1967 evaluation report. We are pleased to see that the College has exercised its right and responsibility to discriminate among these suggestions, rejecting those not viable for the College on its own terms or financially unfeasible at this time.

To place the problems of the College in proper perspective for readers of this letter other than yourselves, let me say that the 1967 team was deeply impressed with the overall progress of the College during the brief period of its existence. Singled out for especial commendation were

1. The enthusiasm, high morale, and pioneering spirit of all members of the College community
2. The excellent administrative organization and operation of the administrative offices
3. The unusual rapport among administration, faculty, and students
4. The structure and potency of the student government
5. The effectiveness of the cultural and student activities programs in the difficult situation of a commuting population.
6. The well-organized and extensive counseling services
7. The strong financial support given to increasing library resources.

We re-affirm these judgments.

The principal problems raised by the 1967 evaluation team, together with the progress achieved during the past year, are summarized below.

I. Academic Objectives

Ambivalence among the faculty regarding academic objectives was observed by last year's evaluators. The College's statement of educational goals conforms to the liberal arts ideal and embraces the proximate objectives of preparing elementary teachers, liberal arts majors for graduate school, and pre-professional preparation in such fields as medical technology and speech therapy.

The ambivalence resulted chiefly from the attitude of some of the faculty toward the teacher-education objective, which they viewed as subordinate to, rather than congruent with, preparation for graduate school. Fundamentally, teacher education and preparation

for graduate school are not conflicting goals—particularly measure to the fact that in most instances the administrators (including counselors) are also qualified teachers who do in fact teach. This deliberate arrangement on your part has strengthened the organization necessary to support the educational program. However, these persons of necessity have light teaching loads. With some notable exceptions, full-time teaching duties are carried by less experienced faculty. Now that the administrative structure is pretty well set and functioning smoothly, you should consider redeployment of your present teaching resources or bringing in more faculty at the upper levels with qualifications equivalent to those of your teacher-administrators. (I realize that the appointment of a new chairman of the foreign language department is a step in this direction.)

Salaries

Salaries for lay faculty continue to improve. Percentage increases for 1968-69 at the assistant and associate professor levels are considerably higher than the national averages. Also, for next year, the stated range at least at the associate professor level will be more than theoretical. Up to and including this year, each lay person has received the minimum of the range for his rank. Despite improvement, salaries are still not competitive unless the college intends to continue to rely heavily for its lay faculty on graduate students who are likely to leave when the doctorate is completed. The administration is to be commended for working closely with the Faculty Welfare Committee on faculty salaries.

Faculty Organization

Within the past year, by-laws, including definition of duties, have been developed for each faculty-administrative standing committee. Some committee members are elected by the faculty as a whole, but committees are advisory only to the appropriate administrative officer. The actual decisions thus rest with the administration. Mercy College does not yet have a faculty organized as a deliberative and legislative body with its own by-laws and control of educational policies and curriculum.

Since the current President and Dean for Academic Affairs operate by arriving at consensus, the faculty at Mercy do in fact have a strong voice in determining the educational program. However, should there be a change in administration, the way is open for autocracy.

We understand that you are fully aware of this danger and are moving toward some form of faculty government—possibly a senate. The type of government is entirely your own affair, considering whether it would be simpler and just as effective for a faculty the size of Mercy's to act as a whole rather than through elected representatives. The present standing committees would under this plan report to the faculty.

As to the present committee structure, we are not entirely clear as to the differences in the responsibilities of the Academic Delegates (Department Chairman) and the Faculty Curriculum Committee. Unless this situation is clarified, you may have in fact two curriculum committees which could cause not only duplication of effort but conflict.

Other Areas

Progress in several other areas can be noted quickly. A director of development has been appointed and is now on duty. Several additions to the clerical staff have been made. The new wing of the building, well on its way to completion, will amply solve present overcrowding.

The number of lay members on the Board of Trustees has increased to five. The Board, operating under new by-laws, is now a self-perpetuating body empowered to elect the president of the college. These changes, unusual for a Catholic women's college, are viewed enthusiastically by the college community. The College administrators have themselves raised the question as to whether any college official other than the president should be a member of the Board of Trustees. There was considerable discussion of this point among the Case Study participants. We suggest that it is a topic worth pursuing further.

In general, we are impressed by the very considerable progress you have achieved at Mercy College during the past year and wish to express our confidence that you will progressively fulfill the potential so evident at the College.

Please accept our grateful thanks for your warm and friendly spirit, your candor, your openness to suggestion, and your dedicated service to education. You have our every good wish for the continuing growth and success of Mercy College.

Most sincerely yours,

/s/ MARGARET F. LeCLAIR

Margaret F. LeClair

P.S. This report is being sent to the College before it is considered by the Commission on Higher Education. It therefore represents the opinions of the observers, not necessarily those of the Commission.

cc: Members of the Commission on Higher Education, Middle States Association of Colleges and Secondary Schools.

EXHIBIT 4

[Letter from Mercy College to Commission on Higher Education]

MERCY COLLEGE

February 15, 1973

TO: Commission on Higher Education
Middle States Association of Colleges and Secondary Schools

Commission action which preceded this report:

Accreditation, May 6, 1968

Coverage requested:

"In order to keep closely related to the development of the College, the Commission is requesting a general progress report. . . ."

— Letter from Frank P. Piskor to Mercy College, May 6, 1968.

555 BROADWAY, DOBBS FERRY / WESTCHESTER COUNTY, NEW YORK 10522

I. The Nature of the College

In order to provide clarity in the reading of this *Report*, it is important to describe the nature of the college as it exists today. Mercy College is strikingly different from the college visited by the evaluation team five years ago; different because the college chose to respond to the diversity of the students seeking admission and matriculation.

For example, the 1966-67 Self-Evaluation Report stated what the Mercy College Community believed to be several of its limitations: (1) that Mercy College was an educational institution for women only; (2) that there was a homogeneity of cultural backgrounds among the students; and (3) that students had, by and large, to finance their own education.

Today, men and women from a wide variety of cultural backgrounds are enrolled at Mercy College. Culturally disadvantaged students are registered in the Community Leadership Program which is partially funded through the New York State Higher Education Opportunity Program and Mercy College itself. Approximately sixty students are employed in the Criminal Justice field and are sponsored in part by the Federal Law Enforcement Education Program. The College has a substantial program, AWARE — for adults who are returning to education — designed to accommodate more students from Westchester County and its environs. Further, the College has initiated another program for men and women sixty-five and over, AFTER — alternatives for those entering retirement. Finally, Mercy College is now populated by large numbers of transfer students from the community colleges in this area as well as other four-year institutions of higher learning.

The nature of the College has also changed sharply in that the Board of Trustees is now made up primarily of lay persons and the College has become non-sectarian. Many students still finance their own education.

It should be noted that these changes have occurred in just a five-year period. The enrollment has tripled; the mixture of cultural backgrounds has given the faculty members an opportunity to expand their horizons; a similar opportunity has been experienced by the student body. New ideas have been tried. They have been accepted or rejected. Change has become the vehicle for the growth of the college. Diverse programs have been offered and academic quality, as measured by an increase in the number of earned doctorates held by the faculty, has risen.

It is with this fresh approach to the nature of Mercy College that this information is submitted.

[See "Facts About Mercy College" (Appendix A)]

II. The Development of This *Report*

This *Report* is the result of the efforts of basically two committees of the College Community: the Middle States Committee, appointed October 1969 — composed of faculty, administration and students — designed to guide the College Community to action reflecting Mercy College's response to the Middle States Association's recommendations; and, the Committee on Purposes, Goals and Objectives, appointed October 1971 — a committee of the faculty — designed to respond to the New York State Board of Regents request for a Ten-Year Master Plan.

Background

In its continued interest in self-awareness, the Mercy College Community set aside March 27th-29th 1972 as All-College Workshop Days to involve its faculty, administration and students in discussion of the past, present and future of

the College. Further, this opportunity was used to involve these segments of the Community in the development of the Ten-Year Master Plan.

As a result of these Workshops an *ad hoc* Committee to Discuss Purposes, Goals and Objectives of the College was formed and delegated to report back to the faculty. The definitions of purpose, goal and objective are similar to those found in the New York State Regents Bulletin of Priority Concerns.

The Purposes, Goals and Objectives are, therefore, quoted from this Master Plan since they were developed, accepted and implemented by the Mercy College Community as an entity.

E. Salaries

1. Are faculty salaries becoming competitive?
2. Does the college intend to continue to rely for its faculty on graduate students who are likely to leave when the doctorate is completed?
3. Does the administration still work closely with the Faculty Welfare Committee?

Response

Faculty salaries are competitive based upon standards set by the American Association of University Professors. (See Appendix E.)

All but two faculty members (the Director of Physical Education and the Artist in Residence,) at the present time have their Master's degrees. Those faculty who have achieved the earned doctorate have tended to remain with us. A full breakdown on the academic credentials of the faculty is contained in Appendix F.

In January of 1973 the Faculty Welfare Committee was superseded by the Faculty Council; however, it should be noted, that it was the Faculty Welfare Committee working in harmony with the administration that developed the current fringe benefit program for faculty members.

F. Faculty Organization

1. Does Mercy College have a faculty organized as a deliberative and legislative body with its own laws and control of educational policies and curriculum?
2. Has the duplication between Academic Delegates and Curriculum Committee been ironed out?

Response

An attempt to organize the faculty resulted in the presentation of a Constitution for a Faculty Senate, developed during the 1971-72 academic year. Discussion of the composition and powers of the proposed Faculty Senate led to the emergence of the Faculty Council during the Fall 1972 semester. A copy of the By-Laws of this Council will be found in Appendix G.

This Faculty Council has been recognized by the administration and the Board of Trustees.

In addition to this, faculty and students were appointed on five Trustee Committees: Development Committee, Finance Committee, *ad hoc* Presidential Search Committee, Buildings and Grounds Committee and the Long-Range Planning Committee.

The Faculty is presently involved in the revision of the **FACULTY HANDBOOK**. This is being done jointly with the administration, the Committee on Rank, Tenure and Salary, and the Executive Board of the Faculty Council.

AFFIDAVIT OF DONALD GRUNEWALD ANNEXED TO EMPLOYER'S
REQUEST FOR REVIEW IN CASE 2-RC-16181

STATE OF NEW YORK)
COUNTY OF WESTCHESTER)

DONALD GRUNEWALD, after first being sworn, deposes and says:

1. I am the President of Mercy College, Dobbs Ferry, New York, and in that capacity I am also a member of the Board of Trustees. In addition, I am a professor of political economy. I began my association with Mercy College when appointed President on July 1, 1972.
2. During the pendency of the representation matter up through and including the days of the election, the College was advised by counsel and a labor relations consultant with whom we maintained very close communications.
3. On May 7, 1973 I addressed the members of the faculty concerning my views on labor relations. The minutes of the faculty meeting contain the text of that speech, and appears in the N.L.R.B. case file.
4. The October 31, 1973 memorandum from the Mercy College Faculty Counsel Advisory Board to the Mercy College Faculty, was distributed to the members of the faculty and the administration by being placed in the mail boxes at the College on either Thursday, November 1, or Friday, November 2, 1973. It was received by members of the administration on the day of its distribution.
5. A letter over my signature and dated November 1, 1973, was mailed on that morning to faculty residences. This letter was prepared and distributed prior to receipt of the October 31 memorandum by any administration member, and was not in response thereto. No replies were made by the College to this memorandum.
6. The College did not respond to the October 31 memorandum for the following reason: The memorandum was received on either Thursday or Friday; no action was taken to respond to it on Friday or over the weekend due to the difficulty of getting all necessary administrators and counsel to-

gether. By Monday, there was insufficient time remaining to prepare a response. Thus, we were unable to respond to the October 31 memorandum.

7. The Mercy College Faculty Council Advisory Board's November 4 memorandum was distributed to both faculty and administration alike on either November 5 or 6, 1973. The election followed on Wednesday and Thursday, November 7 and 8. No response to the memorandum was attempted by the College due to the obvious lack of available time.

8. To the best of my knowledge, the Middle States report received wide distribution in 1968, when it was issued. A copy of the report is available in the office of the Dean for Academic Affairs. To the best of my knowledge, the document in that office has been examined only 3 or 4 times in the last year or so.

With the possible exception of one person who is presently teaching part time at the College, none of the present part time faculty members were teaching at the College when the Middle States report was issued in 1968.

Of the approximately 69 full time faculty members presently teaching at the College, 22-28 were teaching at the College in 1968 when the report was issued and distributed.

To the best of my knowledge, at the time of the distribution of the report in 1968, there was considerable discussion of its content by various faculty committees.

In February of 1973, an interim progress report was sent by the University to Middle States. A faculty committee participated in the preparation of this progress report. In preparing the progress report, reference was made to the 1968 Middle States report and the comments therein. In June of 1973, Middle States notified the College that the progress report had been accepted. A copy of this letter was posted on the faculty bulletin board. The faculty was also informed of the submission of the progress report to Middle States, and that copies of this progress report were available for examination in the library and the office of the Dean for Academic Affairs.

/s/DONALD GRUNEWALD

EXHIBIT 1

STATE OF NEW YORK

)

ss.:

COUNTY OF WESTCHESTER

)

WALTER McCARTHY, after first being sworn, deposes and says:

1. I am the treasurer of Mercy College, and have been so since July 1, 1970. In that capacity I have gained a familiarity with the various funds which the College maintains, the employment contracts used by the College, and the services provided by the College's personnel.

2. Commencing with the fiscal year ended June 30, 1971, the College operated with a surplus. Consequently, the Board of Trustees directed that a portion of this surplus be set aside in a quasi-endowment fund for future use as the Board saw fit, and expenditure of which would require Board action. Other than requiring Board approval, no other restrictions on the use of the fund were established. Surpluses also existed in fiscal year 1972 and fiscal year 1973, portions of which were transferred to the quasi-endowment fund.

3. Financial statements were posted and distributed to administration, faculty, and students. Copies appear attached hereto as appendices A & B. These statements clearly indicate the existence of this quasi-endowment fund.

4. The existence of this quasi-endowment fund has been the source of pride to the College. Consequently, its existence and size have been noted in the Fall convocation addresses of College Presidents since the surplus of fiscal year 1971 made it possible, and has been mentioned by President Grunewald at various committee meetings. The existence of this fund has in no way been concealed or hidden from the members of the faculty. In fact, it is mentioned in the President's annual reports which are read or distributed to the faculty. Pertinent parts appear annexed hereto as appendices C & D.

5. There are no funds maintained by the College that do not appear on the attached financial statements.

6. This fund was the subject of discussion at meetings at which faculty members were present, at general faculty meetings, and at negotiating sessions at which faculty committees were active.

7. The following types of employment arrangements exist at Mercy College.

- a. Persons holding a full time teaching contract only.
- b. Persons holding a full time teaching contract plus a letter of appointment to an administrative position either decreasing or eliminating the number of hours to be taught and/or adjusting rates of pay.
- c. Persons holding a part time teaching contract only.
- d. Persons carrying a letter of appointment to an administrative position and a part time teaching contract.
- e. Persons carrying a letter of appointment to an administrative position only.

Administrative letters of appointment are terminable at will by either party; full and part time teaching contracts last for specific periods of time.

8. Lists showing all faculty members, their course loads, eligibility for membership in the MCFC per its by-laws and eligibility for inclusion in the bargaining unit appear attached hereto as appendices E & F.

9. In the Spring of 1969, an Ad Hoc faculty committee for salaries was formed by the faculty. Initially this committee met with the Dean for Academic Affairs and the Director of Development.

This faculty committee subsequently met with the Board of Trustees en banc, and thereafter negotiated with a subcommittee of the Board.

As a result of these negotiations, a w-year wage package for the faculty was agreed upon. In addition, a fringe benefit package, including Blue Cross, Blue Shield, major medical and pensions was established for the first time.

10. In the Fall of 1970, the Faculty Welfare Committee and Faculty Committee on Rank, Tenure and Salary met with the administration to discuss wages. The committees adopted, substantially, the administration proposal. The

proposed scale was presented to the faculty and was approved. In the Spring of 1971, the Board of Trustees approved the proposal.

11. In the Spring of 1972, the Faculty Welfare Committee submitted a list of demands to the College President covering wages, benefits, and working conditions. Negotiation on these issues was delegated to Mr. Anthony A. Ivancich, Director of Development, and myself. These negotiations proceeded until August 1972. A 4-year program for fringe benefits was established, along with retention of the pre-existing salary determination scale. Part time salaries were adjusted. The terms of the contracts which provided for 15 credit hours per semester, were changed to 12 credit hours per semester to reflect the actual work load carried. This was done at the request of the faculty committee.

12. In the Fall of 1972, the Faculty Committee presented a list of demands on working conditions, which were disposed of through negotiations.

13. In the Spring of 1973, a list of demands was presented to the President, who delegated negotiating responsibility to the same negotiating team. We met once to set the procedures. Prior to the second scheduled meeting, we became aware of a union organizational drive and suspended negotiations.

14. In addition to this collective participation by the faculty in determining contract terms, several individuals have negotiated substantial changes in their contracts.

Examples are: Sr. Joannes Christie R.S.M., who negotiated for a reduction in her course load to 9 hours at 3/4 pay due to health reasons. A copy of the modified contract is attached hereto as appendix G.

Sr. Jeanne M. Neillis R.S.M., who, along with other science department professors, had her contract modified to reflect a 15 "contact" hour load, as negotiated by the science department faculty as a sub-group.

Dr. Dominick Angiello, who negotiated an additional wage increase individually with the President of the College.

15. Neil Judge, the Director of Athletics, carries a letter of appointment as an administrator. Judge's present responsibility is the development of the intra and inter-mural athletic programs at the College. He spends most of his time in performing this responsibility.

Judge reports to the Dean for Student Services, as do the following persons:

- Director of Counseling Center
- Placement Director
- Choral Director
- Director of Interfaith Center and chaplains
- Director of Student Activities
- College Physician
- College Nurse

All of the above are excluded from the bargaining unit. Those in the bargaining unit report to the Dean for Academic Affairs.

16. Judge is responsible for preparing the budget for the Athletic Department, which he submits to the Dean for Student Services, who incorporate it into his budget to the College. Those in the bargaining unit submit their budget to the Dean for Academic Affairs.

Judge's duties include coaching men's basketball and baseball. He hired John McMahon as women's basketball coach for this year. (Appendix G(1))

17. In addition, he has enlisted the aid of an assistant coach for basketball and a tennis coach. Due to present budgetary restrictions both serve in a voluntary capacity. However, as the program expands it is estimated that additional paid coaches will be hired.

As athletic director, Judge affiliated Mercy College with a small college basketball league.

18. Last year Judge carried a letter of appointment as coordinator of athletics, a full time administrative position. He coached various teams during that period of time.

19. Judge's position may be contrasted with that of Margaret Melford, the "Director of Physical Education," who is hired under a full time teaching contract only. She does not have a letter of appointment as an administrator, and does not serve in any administrative capacity. She is characterized as a "Director" because she is the sole member of her department and it was thought to be foolish to characterize her as chairman of a department without any other faculty. However, she functions as a chairman. She reports directly to the Dean for Academic Affairs, and was eligible to vote.

Judge is listed in the college's last two catalogs as an administrator but not as a member of the faculty. Everyone eligible to vote is listed as faculty.

He does not attend faculty meetings or vote in faculty elections.

Judge receives raises in accordance with administrator determinatives rather than on a faculty wage scale.

It should be noted that all eligible voters come under the jurisdiction of the Dean for Academic Affairs, while Judge reports to the Dean for Student Services.

20. In addition to his duties as Director of Athletics, Judge taught one 3-credit physical education course during the Fall semester, under a part time teaching contract. This course was for credit.

21. The following administrators have taught courses at the College while carrying on their administrative functions:

1. Dean for Academic Affairs.
2. Assistant Dean for Academic Affairs
3. Dean for Student Services
4. Dean for Bilingual Programs
5. Director of Undergraduate Advising
6. Assistant Academic Advisor
7. Director of Counseling Center

8. Director of Career Counseling

9. Treasurer

All of the above carry or have carried part time teaching contracts, and are excluded from the unit.

/s/ Walter McCarthy

APPENDIX G(1)

To: Walter McCarthy

From: Neil Judge

Subj: Women's Basketball Coach.

Dear Walter,

John McMahon has been hired as the Women's Basketball Coach.

/s/ Neil D. Judge

EXHIBIT E

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 2

MERCY COLLEGE

Employer

Case No. 2-RC-16181

and

MERCY COLLEGE FACULTY COUNCIL

Petitioner

SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election issued by the Regional Director on July 12, 1973, an election by secret ballot was held on November 7, and 8, 1973, in a unit composed of all full time and regular part time members of the faculty employed by the Employer including department chairmen, assistant library director and reader services librarians but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.¹

The balloting resulted in 42 votes being cast for the Petitioner, 41 votes cast against it, and three challenged ballots. Accordingly, the challenges are determinative of the results of the election. During the ballot count, Petitioner

¹ Although the Board would not, since its decision in *New York University*, 205 NLRB No. 16, issued on July 20, 1973, include regular part time faculty in the same bargaining unit with full time faculty, the decision herein was issued prior to the enunciation of the new Board policy in *New York University*, and the inclusion herein of part time faculty in the unit was based on a stipulation of the parties.

challenged the decision of the Board Agent to validate the ballot annexed hereto as Exhibit A as a "no" vote; similarly, the Employer challenged the Board Agent's decision to count the ballot annexed hereto as Exhibit B as a valid "yes" vote. The Board Agent overruled both of these challenges, counted them as valid "no" and "yes" ballots respectively and included them as such in the tally of ballots, summarized above.²

On November 14, 1973, both the Petitioner and Employer filed timely objections to the election, copies of which were served by each upon the other party.

The Petitioner's objections in substance are as follows:

1. That the Board Agent was in error in counting the ballot annexed hereto as Exhibit A as a valid "no" ballot; in the face of Petitioner's challenge to its validity, and that it should instead, have been declared void; and
2. That certain actions were taken by officers of the Employer within 24 hours of and on the day of the election to coerce, intimidate and influence certain voters.

The Employer's objections in substance are as follows:

1. That the Board Agent was in error in counting the ballot annexed hereto as Exhibit B as a valid "yes" ballot, when that ballot was either void or a "no" ballot.
2. That the Board Agent improperly refused to treat the questioned ballot as a challenged vote, by including it as a valid "yes" vote in the tally of ballots.
3. That Petitioner distributed a sample ballot, a copy of which is annexed hereto as Exhibit C, which ballot does not accurately reflect the ballot used by the Board.

² The two ballots were placed in a special envelope to preserve their identity pending resolution of the issues, and these will be discussed *infra*.

4. On information and belief, that officers and/or agents of the Petitioner alleged in words or substance that the Employer maintained a "hidden" fund from which additional faculty salary increases would be taken if the Petitioner were certified, when in fact, no such "hidden" fund has been or is being maintained and assertions to the contrary constitute material misrepresentations of fact requiring that the election be set aside.

5. On or about November 1, 1973, members of the voting unit received the memorandum, a copy of which is annexed hereto as Exhibit D, which memorandum contained several material misrepresentations of fact, any one of which requires that the election be set aside, to wit:

- A. Members of the voting unit were advised that "for the very first time you will have some say in what goes into your contract," In reality, members of the voting unit have had "some" say in what goes into their contracts since the spring of 1969.
- B. The Petitioner mischaracterized the Decision and Direction of Election of the Regional Director in this case.
- C. The Petitioner quoted the above decision out of context, thus materially misrepresenting same.
- D. The Petitioner in quoting the above decision excised portions thereof, thus materially misrepresenting the statements made therein.
- E. The Petitioner asserted that "virtually everyone teaching at Mercy is automatically a member by the terms of the By-Laws of the organization. Whereas, in fact, membership in the Mercy College Faculty Council is not available to those faculty persons teaching less than 6 hours, who do not carry letters of appointment, which persons constituted 15% of the voting unit. Further, that voting membership in the Mercy College Faculty Council, is predicated on payment of dues for the current academic year. Omission of these facts constituted a material misrepresentation.

F. The Petitioner propounded the following question and answer:

“Q – Will a ‘yes’ vote change the existing status of such basic thing as tenure, the probationary period, etc.?
A – No. All matters of faculty rights, status, benefits, etc. would become part of the content of a legally binding contract with any abridgement subject to legal redress . . .”

While the matters referred to above would, to the extent required by law, become the subject of collective bargaining, there is no legal requirement, as implied above, that they would become part of a legally binding contract. Thus, the above quoted statement constituted a material misrepresentation of fact.

G. The Petitioner propounded the following question and answer, which constitute a material misrepresentation of fact.

“Q – What if it came to the extreme situation of a strike, would I have to participate, picket, etc.?

A – We cannot imagine this administration, or any future administration, interested in pushing matters to that extreme. In any case, strikes can never be called unless you, the members of the bargaining unit, vote for it.

According to the Employer, the By-Laws of the Mercy College Faculty Council contain no provision restricting strikes to those situations in which the members of the bargaining unit have voted therefor. Furthermore, the record in the representation case demonstrates that the Advisory Board of the Advisory Board of the Mercy College Faculty Council has authority to disregard the wishes of the membership. In addition, a labor organization, under the law, may fine its members for failure to participate in a strike.

6. On or about November 5, 1973, the Petitioner distributed a handbill, which, in pertinent part, stated:

"Also, many of us remember that outside accrediting agencies, such as Middle States, have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision making — 'authoritarian' was their word."

The quotation set forth above materially misrepresents the comments of the Middle States Association.

In the course of the election proceedings, the Board Agent challenged the ballots of Donald Thorn, William Lindsey, and Neil Judge because their names did not appear on the list of eligible voters.

In addition, the Petitioner and Employer, each challenged the validation by the Board Agent of two marked ballots as noted more fully above, in Petitioner's Objection 1 and Employer's Objections 1 and 2.

Pursuant to Section 102.69 of the Board's Rules and Regulations the undersigned caused an investigation to be made of the objections and challenges. During the investigation the parties were afforded a full opportunity to submit evidence bearing upon the issues. The undersigned also caused an independent inquiry to be made. The results of the investigation are discussed below.

PETITIONER'S OBJECTIONS.

Petitioner objected to the failure of the Board Agent to treat as a challenged ballot, the ballot annexed hereto as Exhibit A, and to his conduct in counting said ballot as a valid "no" vote. The investigation disclosed that although the Board Agent counted the disputed ballot as a "no" vote and included it in the tally as such, he immediately thereafter placed it in a separate envelope for safe keeping where it is available for my examination. I shall treat the ballot as a challenge by Petitioner, and it will be discussed as *s. l. a. infra*. Since I am in a position to review *de novo* the merits of the Board Agent's ruling, no prejudice will accrue to Petitioner from the Board Agent's conduct. Accordingly, I shall overrule Petitioner's objection to the

Board Agent's refusal to treat the disputed ballot as a challenged ballot.

Petitioner's second objection, relating to coercion and intimidation of voters, is phrased in general terms. Petitioner, though requested to do so, has not submitted any evidence in support of its objection, and specifically informed this agency it would not do so. I find no merit to this objection.

THE EMPLOYER'S OBJECTIONS.

Objections 1, 2. Since these objections involve the same incident I shall treat them together. The objections in substance allege that the Board Agent was in error in counting the ballot annexed hereto as Exhibit "B" as a valid "yes" ballot where it should have been held to constitute a void or "no" ballot, and also in refusing to treat it as a challenged ballot. The investigation disclosed that the disputed ballot was counted as a "yes" ballot. The investigation disclosed that the disputed ballot was counted as a "yes" ballot by the Board Agent and noted as such in the tally, but that he immediately thereafter placed it in a special envelope thereby preserving its separate identity and it is available for examination by me. I shall treat it as a challenged ballot and discuss it as such, *infra*, in the section on Challenged ballots. In these circumstances, and since it is clear that no prejudice will result to the Employer if the issue is disposed of in this manner, I find the objection, *qua* objection, lacking in merit.

Objection 3. This objection alleges that Petitioner distributed a sample ballot, a copy of which is attached hereto as Exhibit C, which did not accurately reflect the ballot used by the Board, and the election should therefore be set aside. The investigation disclosed that Petitioner distributed the "sample ballot" in issue to employees on November 6, 1973.³ Though it is highly doubtful that the item referred to by the Employer as a "sample ballot" could under any reasonable definition of a ballot qualify as such, it is clear

³ Unless otherwise noted, all dates referred to herein occurred in 1973.

from examination of this item that it does not purport to be a reproduction of a Board ballot, nor can it possibly be construed as such. It contains no reference to the Board or to any governmental agency, and although it urges a "yes" vote, it in no way creates or attempts to create the impression that the Board was endorsing a particular choice in the scheduled election. I therefore find no merit to the objection.⁴

Objection 4. The Employer alleges, on information and belief, that officers or agents of the Petitioner alleged in words or substance that the Employer maintained a "hidden" fund from which additional faculty salaries would be paid if Petitioner were certified. The Employer denies that there are any "hidden" funds and asserts that full disclosure of the College's financial status has been made annually to faculty, staff and students alike. The Employer contends that Petitioner's statements therefore constitute a material misrepresentation which warrants setting aside the election.

In support of its contention that the alleged misrepresentation was uttered by the Petitioner, the Employer refers to a conversation held on or about November 1, between Dr. Cancela, Dean for Bi-Lingual Programs⁵ and a faculty member (who is in the bargaining unit), in which Dr. Cancela received "the impression" from the faculty member involved that the latter, in an *earlier* conversation with Dr. James Lindsay, an elected member of Petitioner's Committee on College Governance was told by Dr. Lindsay of the existence of a "hidden" or "slush" fund maintained by the Employer. Dr. Cancela reported his impressions to a meeting of the administration on or about November 1.⁶

⁴ See *The Glidden Company*, 121 NLRB 752, 755-56.

⁵ Dr. Cancela was excluded from the bargaining unit, as were all deans, by stipulation of the parties.

⁶ The recital set out in the above paragraph is based on a letter from Employer's counsel of January 13, 1974. The letter speaks of Dr. Cancela's "impression", received from his informant, (the faculty member), that Dr. Lindsay had spoken to the informant of a "hidden" or "slush" fund.

Both Dr. Lindsay and the faculty member who was the source of Dr. Cancela's "impression", and they are the only people directly involved in the conversation in issue, deny that Dr. Lindsay ever alleged the existence of a "hidden" or "secret" or "slush" fund.⁷ The faculty member did recall that Dr. Lindsay said, in answer to a question concerning the effects of faculty raises on the Employer's financial position, that the Employer either had or could obtain funds somewhere. The conversation was a private one with no other person present.

The Employer further alleges that similar statements were made, on or about November 1, by representatives of Petitioner at a meeting of faculty called by it. To support the allegation, the Employer submitted the names of four persons whom it believed had knowledge of the incidents: Dr. Lindsay, the faculty member referred to above, and two additional faculty members. Although it appears from the investigation that there were discussions among faculty members at various times concerning the Employer's financial position and the existence of a known and acknowledged quasi-endowment fund maintained by the Employer, none of the witnesses supported the Employer's allegation that Petitioner or its representatives claimed the existence of a hidden, secret or slush fund.

Accordingly the evidence fails to support this objection.⁸

Objection 5. This objection is based on the distribution by Petitioner, on November 1 or 2, of a three page "memorandum" or handbill, dated October

⁷ For purposes of this objection I shall assume without determining that Dr. Lindsay was an agent of Petitioner and was speaking on behalf of Petitioner.

⁸ Since I find no misrepresentation, I need not nor do I decide whether, had the misrepresentation occurred and further, had it been found to constitute a substantial one, it would have formed a basis for setting aside the election, in face of the fact that the Employer had adequate opportunity between November 1 and November 7, the first day of the election, to effectively respond, all the more since the Employer and not Petitioner could be expected to have ready access to the correct information.

31 (Exhibit D attached hereto) to all faculty members and administrative personnel at the College, a memorandum which, the Employer contends, contained several material misrepresentations, described below in items A through G, each of which constitutes, separately, a ground for setting aside the election.

Item A - The Employer alleges that the handbill contained a material misrepresentation in Petitioner's statement to employees that if they voted "yes" for Petitioner it would mean that Petitioner would be recognized as the employees' bargaining agent and this is what the Employer finds objectionable - "for the very first time," employees would have "some say" in what went into their "contract."⁹ The claim of Petitioner that employees would for the first time have "some say" constitutes a material misrepresentation because, in truth, according to the Employer, the faculty have had "some say" constitutes a material misrepresentation because, in truth, according to the Employer, the faculty have had "some say" in their contract term since 1969.

Since about 1969 one or more committees representing faculty have met with administration representatives to discuss, *inter alia*, salary scales, pensions and health, life and disability insurance. In 1970 and again in 1972,

⁹ The pertinent section of Petitioner's leaflet from which the above statement is taken is quoted here in full, as follows:

- Q. Precisely what am I voting for or against? Is this a vote for or against having a union at Mercy College?
- A. The question you will see on the ballot reads as follows: Do you wish to be represented for purposes of collective bargaining by MERCY COLLEGE FACULTY COUNCIL? You are *not* voting to accept or reject any union affiliation. A "yes" vote will mean that your already existing organization will be recognized by the N.L.R.B. as your bargaining agent and therefore will have the sanctions of New York State and Federal law to back up its action on your behalf. *Equally important is the fact that for the very first time you will have some say in what goes into your contract.* (Emphasis supplied).

reports on the discussions were widely distributed to the members of the faculty. There were also general faculty meetings to discuss and in some cases to approve, the matters which had been discussed with management. On May 7, shortly after the filing of a representation petition with the Board,¹⁰ Dr. Donald Grunewald, President of Mercy College, in a personal address to the faculty, recounted the history of faculty participation in the negotiation of faculty salaries and other benefits.¹¹ From the foregoing, it is abundantly clear that the faculty had "some say" as to what went into their contracts prior to November 1973. Therefore I find that the claim of Petitioner that if it were certified as bargaining agent employees would "for the first time" have some say in what went into their contract, constitutes a misrepresentation. Additionally, though the matter is not entirely free from doubt, I would find too that the misrepresentation was a substantial one because Petitioner was in effect telling employees they had had *no* say whatsoever in the past in matters as important to them as conditions of employment.

However, as the Board stated in *Hollywood Ceramics Company, Inc.*,¹² even a substantial misrepresentation of fact by a party will not be sufficient grounds for setting aside an election where the employees possessed independent knowledge with which to evaluate the misrepresentation.

In the case at hand, I find that the employees did possess such knowledge. The question of faculty participation in the administration and in setting their terms and conditions of employment had long been a matter of concern to both parties. With the filing of Petitioner's first petition on May

¹⁰ A petition for the Mercy College faculty was filed by Mercy College Faculty Council (affiliation pending - NYSUT - NEA/AFT-CIO) on May 4, 1973, in Case No. 2-RC-16168 but withdrawn on May 17, 1973. The instant petition was filed on May 17, 1973 by Mercy College Faculty Council.

¹¹ Dr. Grunewald's speech is attached hereto as Exhibit E.

¹² 140 NLRB 221,224.

4, the subject became a campaign issue. Thus, at the general faculty meeting of May 7, a motion was made from the floor (and passed) accusing the administration of interrupting the accepted procedure for determining salary, and asking that the "faculty continue to seek as their right the participation in determining salary." At this same meeting President Grunewald, in a long speech delivered to the assembled faculty, reviewed the history of faculty participation in college governance, and expressed a preference for a system of collegial governance over intrusion by an outside organization, a system based on "shared authority," with the faculty, administration, the students and others participating (Exhibit E). He cited as a specific example of his concept of college governance an improvement in fringe benefits "successfully negotiated" by a faculty committee and the administration. Clearly Dr. Grunewald was illustrating for the assembled faculty a sample of their "say" in improving their conditions of employment.

On or about November 1, Petitioner distributed the flyer of which the Employer complains. At more or less the same time, though apparently not in response to Petitioner's flyer, the Employer distributed a three page letter over the signature of Dr. Grunewald, dated November 1, to the unit employees (Exhibit F) urging them to vote "no" and again reminding the faculty, albeit briefly, of the governance responsibilities "shared" by the faculty meeting, faculty committees, and the administration, a statement which, whether considered separately or in conjunction with the May 7 speech of Dr. Grunewald, reaffirms the Employer's position of a "say" by the faculty, in contradiction of the objected-to-statement of Petitioner.

It is clear that faculty participation in college governance and in determining salaries and other conditions of work was a campaign issue and was discussed as such by both sides. In these circumstances, I conclude that the

faculty was in a position to recognize and independently evaluate Petitioner's statement which the Employer finds objectionable. Accordingly, I find insufficient support for this objection (Item A of Objection 5).¹³

ITEMS B. C. AND D. In its October 31, 1973 memorandum to the faculty (Exhibit D herein), the Petitioner propounded the following question and answer:

Q. — If union affiliation is not involved in this election why am I constantly hearing suggestions and talk as though it is?

A. — Primarily for two reasons:

1. The administration is trying to leave the impression that this election is to bring in a union, (presumably on the assumption that the idea will cause many faculty members to vote No.) For example, the Administration spent thousands of dollars of college funds over the summer to foist off on the N.L.R.B. officials the notion that the faculty Council was a

¹³ Additionally, I note that the Employer was aware on November 1 or 2 of the specific misrepresentation of which it complains. The election was on November 7. The Employer therefore had an adequate opportunity to reply either by mail or by insertion in the boxes of faculty members, to this *particular* statement of Petitioner had it elected to do so. (It had of course otherwise publicized its position on faculty participation during the campaign). Its failure to do so would bar as a viable objection its present contention that Petitioner's campaign material of November 1 prevented the exercise of a free choice by the employees. See *N.L.R.B. v. Louisville Chair Co.*, 385 F.2d 922, 927 C.A. 6), cert. den. 390 U.S. 1013, where the court said, in pertinent part: "Having deliberately by-passed its opportunity to reply the Respondent cannot now contend that the Union's campaign material, which was refutable, prevented the exercise of a free choice by its employees in the election of their bargaining representative." See also *The Holtite Manufacturing Co., Inc.*, 146 NLRB 385, 387.

"fronting operation" for a union and therefore that the organization's name on the election ballot should claim that an affiliation is pending with various unions (N.Y. State United Teachers, etc.). However, the officials held as follows:

"Based on the foregoing, and on the record as a whole, I find that the Employer has failed to support its contention that Petitioner's name is incorrect or misleading. No justification exists at this time for requiring Petitioner to add to its name words to the effect that it is in process of affiliating with some other organization, an action its membership has not and may never authorize. Nor is there any substance to the Employer's allegation that Petitioner . . . is a "front" for NYSUT . . ."

2. The second reason you hear so much talk about Union is that many faculty members argue in favor of affiliation, claiming that the Faculty Council will not really be worth much — even with the forthcoming legal status — without the resources that would come with union affiliation such as legal assistance, specialized knowledge in negotiating, the resources of an organization larger than ourselves, etc.

It is the employer's contention that the quoted excerpt from my decision constitutes a "mischaracterization" of that decision, that the excerpt was quoted out of context and that portions thereof were excised, thereby materially misrepresenting the decision.

I have carefully compared Petitioner's statement with my decision in this case and find that the portion excerpted and quoted by Petitioner does not mischaracterize that decision. Nor do I find that the excerpt has been quoted out of context, as that term is commonly understood, particularly in view of the frame of reference in which it has been placed by Petitioner, and even less does it, in the context in which it has been used, constitute a material

misrepresentation. Finally, the two excised portions, which excisions were properly noted by ellipses in Petitioner's statement, do not materially alter the meaning of my decision.¹⁴

For all the foregoing reasons I find no merit to Items B, C and D of Employer's Objection 5.¹⁵

Item E. Petitioner presented the following question and answer in its campaign memorandum of October 31 which it distributed to members of the faculty on November 1 or 2.

Q. - Who is in the Faculty Council? Is it the advisory Board group of people?

A. - No. Virtually everyone teaching at Mercy is automatically a member by the terms of the By-Laws of the organization.

The Employer contends that Petitioner's statement on membership, quoted above, constitutes a material misrepresentation of fact because of certain omissions therein of the true facts relating to membership, which facts may be found in Petitioner's By-Laws. The pertinent provisions of the By-Laws as adopted on October 4, 1972 provide:

¹⁴ The excised portions of my Decision, as indicated by the ellipses, in order of appearance, are as follows:

- (1) "which was independently formed, with its own officers, constitution and by-laws and which is structured and administered independent of NYSUT,"
- (2) "merely because it sought and accepted assistance from that group in efforts to secure recognition from the Employer."

¹⁵ Moreover, and for reasons set out by me in footnote 13, *supra*, I find that the Employer had an adequate opportunity to reply to Petitioner's alleged misrepresentations. Its failure to do so constitutes an additional reason for my conclusion that the objection does not form grounds for setting aside the election. Footnote 13, *supra*.

Article III. Members

Section 1. All persons carrying a teaching load of six hours or more at Mercy College are members of this Council. Persons carrying a letter of appointment to teach less than six hours are associate members with one-half-vote.

Section 2. Librarians by virtue of their function and rank shall be eligible for membership in this Council.¹⁶

Article IV. Dues and Finances

Section 1. Dues are five dollars per academic year, payable on the first day of classes.

Section 2. Members who have not paid the current year's dues within thirty days after the due date are ineligible to vote in Council meetings that semester, except that a member may reinstate his voting privileges at any time by paying the current dues at least one week before the next meeting.

The Employer's objection is grounded on its claim that the term "letter of appointment to teach less than 6 hours" (Article III, Section 1, above) is a document which is given to *administrators* of the college with the result, according to the Employer, that part-time faculty members who are not administrators but who teach less than 6 hours, and who constitute about 15% of the voting unit, were and are excluded from membership in the Mercy College Faculty Council, all of which is contrary to Petitioner's assertion that "virtually" all teaching employees are members under the By-Laws.

The Employer further maintains that to be a voting member of the Mercy College Faculty Council, employees have to pay the dues for the current

¹⁶ This provision was added by an amendment on March 5, 1973.

academic year and that here again Petitioner's literature omitted facts of sufficient importance to constitute a material misrepresentation warranting that the election be set aside.

The investigation established that during 1972, there were discussions among the faculty and a number of meetings looking toward creation of a faculty organization with appropriate by-laws.¹⁷ The By-Laws in their present form were adopted on October 4, 1972. It was the intention of the By-Laws as adopted to establish an organization which was open to all persons who taught at Mercy College whether full-time or part-time.

As for the phrase "letter of appointment to teach" used in the By-Laws, it was, according to Drs. Grow and Lindsay, used to refer to a form letter given by the College to a part-time faculty member, appointing that person to teach a particular course, and which also constitutes the only written evidence of that person's employment. (See Exhibit G attached hereto, as an example thereof). Dr. Lindsay, who drafted the By-Laws, added that the term was inserted to require that members be in possession of some documentary evidence they held a teaching position.

The investigation further established that the employment relationship between the College and its teaching and administrative personnel is fixed by one or more of several types of documents. Full time faculty receive what is entitled a full time faculty contract, drafted in more or less conventional contract form. Some of the full-time faculty may also receive a supplementary or extra load contract in the form of a *letter*, while others under contract receive a *letter* requesting them to serve in an administrative position, with a reduction

¹⁷ The facts set out below on the adoption and interpretation of the by-laws is based on sworn statements of Dr. Ann Grow, Petitioner's president, who was very active in organizing Petitioner and in the discussions of the By-Laws, and of Dr. James Lindsay who drafted the By-Laws.

or complete elimination of teaching load.¹⁸ In the latter instance, the faculty member may be advised that the teaching requirement of his academic contract will be fulfilled in the performance of his administrative duties.

Unlike full-time faculty whose employment status is fixed by a conventional form contract, part-time faculty receive a form letter which the Employer characterizes as a part-time teaching contract (Exhibit G). The Employer asserts that the term used in Petitioner's By-Law, "letter of appointment to teach," refers to a *letter*, and not a contract, given to *administrators* fixing their employment relationship, as distinct from the contract, albeit in letter form, given to part-time *teaching* faculty. Therefore, it contends Petitioner's campaign statement that "virtually everyone *teaching* at Mercy is automatically a member by the terms of the By-Laws . . ." is misleading and a misrepresentation since non-administrative part-time *teaching* faculty with a course load of less than 6 hours are not encompassed as members by the "letter of appointment" referred to in the By-Laws. (Emphasis added in the quotation)

I find no merit to this contention of the Employer. It is true that the document used to appoint part-time teachers, though in the form of a letter from the administration to the teacher, is signed and returned by the teacher to the Employer and is therefore a *contract*. It is also true that the document used for administrative personnel is strictly speaking a *letter* which "requests" the recipient to assume or continue with certain administrative functions. As is clear from the face of these "administrative" letters they are really supplements to, or modifications of the existing "academic contract" of the employee in question. (See Exhibit H, I and J)

¹⁸ See Exhibits H, I and J, as examples.

It appears that some full time administrators receive only a letter appointing them to their administrative positions.

In any event, however, when we examine the letter-contract form given to part-time teachers (Exhibit G) the intent of the document is clearly stated therein. The recipient is receiving an "appointment as a part-time *lecturer*." (Emphasis supplied). The document also requests that a copy of the "letter" be endorsed and returned as an acknowledgement of "your appointment." On its face, therefore, the form letter-contract used by the Employer may reasonably be construed as a "letter of appointment to teach," since it contains all the elements of that term, a term used by Petitioner in its By-Laws to establish the criteria for membership for part-time *teachers, not administrators*.

There is a further consideration. When one examines samples of the letters of appointment *given to administrators*, it is clear from their face that they do not involve a request to teach but rather a request to serve in an administrative position. (Exhibits H, I, J). This, of course, is precisely what the Employer is alleging with respect to these letters. However, it does not follow that these letters of appointment are what *Petitioner* had in mind in its By-Laws which refers not to "letter of appointment" but to "letters of appointment *to teach*." (Emphasis supplied). Not only do the letter samples (Exhibit H, I, J) to administrators address themselves to purely administrative assignments; they specifically *excuse* the recipient from the "teaching requirement" of his academic contract while engaged in his administrative position.¹⁹

When the foregoing factors are viewed in the light of the interpretation placed on the By-Law term by its drafters, I conclude and find that

¹⁹ The letters state that the *administrative* functions of the position will fulfill the teaching requirements of the person's academic contract.

Petitioner's By-Laws do not exclude part-time faculty who teach fewer than 6 hours.²⁰ Accordingly, and since this provision of the By-Laws does not, as alleged by the Employer, exclude from membership the approximately 15% of the voting unit who are "part-time faculty members who are not administrators and who teach less than six hours," I find no merit to the Employer's claim of a material misrepresentation by Petitioner in the latter's statement that "virtually everyone teaching at Mercy is automatically a member by the terms of the By-Laws.

The Employer is also alleging that the failure of Petitioner to advise the faculty, in the portion of the handbill quoted at the opening of this section, that employees have to pay dues to be a *voting* member, is a material misrepresentation. Reference to the By-Laws, *supra*, shows that "members" who have not paid their dues by a certain date are "ineligible to vote in Council meetings . . ." However there is nothing in the By-Laws to condition *membership* in Petitioner itself on payment of dues. The omission by Petitioner of this factor, whether considered by itself or as it relates to Petitioner's claim of "automatic" *membership*, does not constitute a misrepresentation.²¹

²⁰ It is not without significance that President Grunewald made a statement at one point which in essence agrees with the liberal interpretation placed on membership eligibility by the drafters of that provision. In his prepared speech to the faculty on May 17, President Grunewald stated: "Some groups have apparently already been excluded from the Faculty Council *although the by-laws provide for participation by the entire faculty.*" (Emphasis added.) Exhibit E, page 5, line 16). President Grunewald was referring to the representation petition which asked for a unit of full time faculty only, and not part time faculty.

²¹ Additionally, and for the reasons stated by me in footnote 13, *supra*, I find the Employer had an adequate opportunity to respond to the Petitioner's statement, had it elected to do so. It cannot, in the circumstances, now contend that Petitioner's statement prevent a free choice by the employees of a bargaining representative. See *Louisville Chair Co.*, *supra*.

Item F. In its October 31 memorandum to the faculty (Exhibit D), Petitioner propounded the following question and answer.

Q. — Will a "Yes" vote change the existing status of such basic things as tenure, the probationary period, etc?

A. — No. All matters of faculty rights, status, benefits, etc. would become part of the content of a legally binding contract with any abridgement subject to legal redress. For example many faculty members thought we had a right to elect Department Chairmen until that practice was summarily eliminated by the administration. Such matters could be more effectively challenged.

It is the Employer's contention, that although the above matters would to the extent required by law become the subject of collective bargaining, there is no legal requirement, as implied above, that "they *would* become part of a legally binding contract . . ." (Emphasis supplied).

In his letter of November 1, the faculty members (Exhibit F herein), urging a "no" vote, President Grunewald stated, in pertinent part:

Some of you have asked whether the advent of collective bargaining would mean that there would be negotiations over who would be appointed as administrators and about the planning, priorities and management of the College. The federal labor laws do not require such negotiations. Rather they limit the area of mandatory bargaining to negotiations about wages, hours and other terms and conditions of employment. Despite what you may be hearing, the advent of collective bargaining would not mean that the Faculty Council would have any more rights than any other private sector labor union. As you know, such organizations have little or nothing to do with management policy formulation in the enterprises with which they are associated. All faculty should know that under the federal law the administration is prohibited from making any promises that might affect the outcome of the election and we have, therefore, faithfully refrained from doing so. The Faculty Council, on the other hand, may lawfully promise you anything. It is not, however, required, by law or otherwise

to produce on any of these promises. In these circumstances, no one can say in advance, with any degree of certainty, what the terms of a particular collective agreement will be. *The continuance of existing benefits provided by the College, as well as the union demands, are all subject to negotiations that on some occasions may include threatened or real economic warfare.* (Emphasis supplied)

Assuming *arguendo* that Petitioner's statement constituted a misrepresentation, the Employer's letter of November 1 was a concurrent statement relating to the subject and in effect a response, and employees could evaluate for themselves the conflicting campaign statements. In the circumstances I find the statement in issue could not have had the kind of impact on the election which would warrant setting it aside.²²

Item G. In its October 31 campaign memorandum Petitioner set forth the following question and answer:

Q. — What if it came to the extreme situation of a strike, would I have to participate, picket, etc.?

A. — We cannot imagine this administration, or any future administration, interested in pushing matters to that extreme. In any case, strikes can never be called unless you, the members of the bargaining unit, vote for it.

The Employer contends that this statement constitutes a material misrepresentation of fact. In support of its position, the Employer adverts to pages 100 to 104 of the transcript of the record of the Board hearing in the instant case²³ as establishing that the Advisory Board of Petitioner has authority to

²² I find no significance in the fact that the Employer may not have been aware, when preparing its letter dated November 1, of the specific contents of Petitioner's leaflet of October 31. The conflicting claims were made more or less concurrently.

²³ Exhibit K attached hereto.

disregard the wishes of the membership; that there is nothing in Petitioner's By-laws which restricts strikes to those situations in which members have voted therefor, and that the law permits a labor organization to fine its members for failure to participate in a strike.

The Petitioner's By-laws are silent on the matter of strikes. Petitioner's statement which the Employer finds objectionable may reasonably be viewed as a commitment by Petitioner to the members of the bargaining unit that no strike would be called unless they voted it, and therefore not a misrepresentation at all.

As for the Employer's claim, which it bases on pp. 100-104 of the transcript that the Advisory Board²⁴ of the Petitioner has authority to disregard the wishes of the membership, the investigation revealed the following. At a meeting of Petitioner's members on May 9, a resolution was passed to the effect that the unit for which Petitioner would seek Board certification was to consist of *full-time* teaching faculty and librarians. The minutes of that meeting clearly state there was a discussion on the motion before it was passed, but do not indicate what was said therein. Subsequently, at the joint conference of the parties at the Board office on May 17 in connection with the representation petition filed by Petitioner, Petitioner was represented by 4 of the 6 members of its Advisory Board, including Dr. Ann Grow, Petitioner's president. These representatives agreed to include part-time faculty in the unit. At the representation hearing on June 7, Dr. Grow, under cross examination by the Employer's attorney (pp. 100-104 of the transcript), admitted there

²⁴ The Advisory Board, according to Petitioner's By-laws, consists of the 3 officers of Petitioner and three elected members. (Article VII, Section 1). Article VII, Section 2, which is pertinent to the issue raised by the Employer's objection reads: "The Advisory Board shall have general supervision of the affairs of the Council between its business meetings and shall perform such other duties as specified by these By-laws. The Board shall be subject to the orders of the Council and none of its acts shall conflict with action taken by the whole Council."

was nothing *in the minutes* of Petitioner's May 9 membership meeting to indicate that the position of the membership that the unit consists of full-time faculty was negotiable or which authorized the Advisory Board to take any action in conflict with that of the membership.

Based on the foregoing, the Employer contends that the Advisory Board disregarded the wishes of Petitioner's membership on the unit issue, as those wishes were reflected in the membership resolution passed on May 9 and by analogy could presumably disregard the membership's wishes on a strike. Consequently Petitioner's statement in its leaflet that strikes can never be called unless the membership voted for it, is a material misrepresentation.

An examination of the entire testimony of Dr. Grow on this issue, and not just the portion adverted to by the Employer, establishes that in the discussion on the motion to seek a unit of full-time faculty, at Petitioner's meeting of May 9, it was recognized that the status of the part-time faculty would be one of a number of issues in the representation proceeding, and that Petitioner's representatives would have to enjoy the right to negotiate on these issues and would probably not be able to win on all of them. (See pp. 94, 95, 108-111, 118-119 of the transcript, attached hereto as Exhibit L).

The Employer has disregarded the uncontradicted testimony of Dr. Grow, summarized above. I find that the Employer's allegation, based as it is on a limited portion of her testimony, can not be sustained and further, that in the circumstances herein it borders on the frivolous.

As for the Employer's allegation that the law permits a labor organization to fine non-striking members, it is irrelevant to the issue raised here.

For all the foregoing reasons, I find Item G of Objection 5 to be without merit.²⁵

²⁵ I also find that the Employer had adequate opportunity to respond to Petitioner's statement and on this ground too I find no merit to the objection, for reasons stated more fully in footnote 13, *supra*.

Objection 6. The Employer's objection relates to a handbill of Petitioner's Advisory Board, dated November 4, 1973 (Exhibit M. attached hereto) which Petitioner placed in the mail boxes of faculty members and administrators on the Employer's premises on Novembers 5 or 6. The objectionable statements are to be found in the *second paragraph* of the portion of the handbill quoted below:

Past experience at Mercy teaches us that it is very important that our faculty express itself collectively. In the last five years we have seen a complete turnover of students, of course, but also, three separate administrations and at least a 50% turnover of members of the Board of Trustees. It is the faculty that represents the stable element of continuity for Mercy.

Also, many of us remember that outside accrediting agencies, such as Middle States, have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision-making — "authoritarian" was their word.

Moreover, you may remember that we have tried the idea of a collegial Senate and it failed of support largely over the issue of its built in administrative veto power. We wonder if we can really hope for any better results from the administration's new governance proposals unless there is united faculty support to insure that a reasonable distribution of authority will ensue.

According to the Employer the statements materially misrepresent the comments of the Middle States accrediting agency. These comments appear in a report prepared by the evaluation team of the Middle States Association of Colleges and Secondary Schools (herein Middle States), the accrediting body for schools such as Mercy College. The Middle States report was submitted to Mercy College in about March, 1968, and reads in pertinent part, as follows:

Faculty Organization

Within the past year, by-laws, including definition of duties, have been developed for each faculty-administrative standing committee. Some committee members are elected by the

faculty as a whole, but committees are advisory only to the appropriate administrative officer. The actual decisions thus rest with the administration. Mercy College does not yet have a faculty organized as a deliberative and legislative body with its own by-laws and control of educational policies and curriculum.

Since the current President and Dean for Academic Affairs operate by arriving at consensus, the faculty at Mercy do in fact have a strong voice in determining the educational program. However, should there be a change in administration, the way is open for autocracy.

We understand that you are fully aware of this danger and are moving toward some form of faculty government - possibly a senate. The type of government is entirely your own affair, but we suggest considering whether it would be simpler and just as effective for a faculty the size of Mercy's to act as a whole rather than through elected representatives. The present standing committees would under this plan report to the faculty.

As to the present committee structure, we are not entirely clear as to the differences in the responsibilities of the Academic Delegates (Department Chairmen) and the Faculty Curriculum Committee. Unless this situation is clarified, you may have in fact two curriculum committees which could cause not only duplication of effort but conflict.

The Employer contends that the Middle States report indicates the faculty have a strong voice in determining the educational program and that it praises the College for such faculty involvement. Then, to quote the Employer, Middle States "only as an afterthought cautioned that the *possibility* existed for the development of an '*autocracy*'. Clearly the main thrust of the Association's report was contrary to the statement in the Faculty Council's handbill." Furthermore, since Middle States can grant or withhold accreditation and thus "make or break the College," Petitioner's claim of an unfavorable report on the College administration, when, according to the Employer, the contrary was true, is a material misrepresentation.

The Employer further contends, in substance, that Advisory Board members, who issued the November 4 handbill had special knowledge of the facts since they were present when the report was first released and widely discussed and that other and newer unit members would for this reason accept their interpretation. The misrepresentation is also compounded, according to the Employer, by the substantial turnover in the faculty since the report was issued, and the unlikelihood that other faculty members would seek out the report.

The threshold issue is whether the disputed statements constituted a material misrepresentation. I have carefully read and compared the relevant portions of the two documents and conclude that Petitioner's handbill does not constitute a departure from the truth. Although it is true, as claimed by the Employer, that the Middle States report makes some favorable comments on the extent of faculty involvement, it is also true, and this is admitted by the Employer that the report "cautioned that the *possibility* existed for the development of an *autocracy*." This last is not far removed from Petitioner's reading of the Middle States report of a ". . . fair warning [by Middle States] that *unchecked* administrative authority will lead to rash and arbitrary decision making . . ." (Emphasis added by me only in Petitioner's quotation).

As for the Employer's contention that the section quoted by Petitioner was misleading because it constituted only an "afterthought" in the Middle States report, reference to the report, *supra*, makes it clear that both prior to and following the favorable comments of the report, concern was expressed by the accrediting agency over the extent of faculty participation in administration.²⁶ It was therefore hardly an "afterthought" by Middle States.

²⁶ Thus, the report first states that ". . . committees are advisory only to the appropriate administrative officer. The actual decision thus rests with the administration." This is clearly not a favorable comment. The report goes on to find however that since the "current administration operates by arriving at consensus, the faculty do have a "strong voice" in determining the educational program. But the report then issued the caveat which gave rise to the issue before me that, should there be a change in administration, "the way is open for autocracy."

When the issue raised by the Employer is viewed in its full context, I find contrary to the contention of the Employer, that it can as persuasively be argued that the thrust of the Middle States report did *not* favor the Employer, (as reflected in the section of the report cited by the Employer) as that it did favor the Employer. At worst, Petitioner may possibly be charged with asserting a half-truth. But as the Board stated in *Hollywood Ceramics, supra*, half-truths, though not condoned, would not be grounds for setting aside an election.²⁷ In any event, I find that Petitioner's statement, whether a departure from the literal text or not, was not so consequential as to warrant setting aside the election.²⁸

THE CHALLENGES

1. *The marked ballots*

At the count, Petitioner objected to the validation of the ballot marked herein as Exhibit A, as a "no" vote, contending that the ballot should have been declared void because it provides a means for identifying the voter.

I have carefully examined the ballot in question. It contains the word "yes" printed (or written) in the second horizontal section of the ballot, below and immediately following the last word of the standard Board questions found in this section, which is:

²⁷ At page 224, fn. 6.

²⁸ The Employer also claims that the employees would have had reason to believe the Advisory Board had special knowledge of the Middle States report which would tend to enhance the impact of the alleged misrepresentation on the employees. However I see no grounds for concluding that employees would believe that the Advisory Board had any more intimate knowledge of the Middle States report than did the College administration. Moreover, in view of my finding on the alleged misrepresentation, the issue is irrelevant

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"Do you wish to be represented for purposes of
collective bargaining by -

MERCY COLLEGE FACULTY COUNCIL?"

Over the "yes" there is heavy pencil shading, warranting the inference that the voter was attempting to obliterate the word.²⁹ The ballot also contains an "X" in the designated "no" square, and no other marking. Since the ballot clearly reflects the voter's intent to cast a "no" vote, and the other markings thereon do not inherently disclose the identity of the voter,³⁰ I find the ballot was properly included as a "no" vote in the tally.

The Employer challenged the validity of the Board Agent's decision to count as a valid "yes" vote the ballot identified herein as Exhibit B. The Employer contends that the ballot should be held to constitute either a "no" vote or an ambiguous vote and therefore void. The Employer further contends that the markings provide a means for identifying the voter, and the ballot should be voided on this ground too.

The ballot in question contain an "X" in the designated "no" square, but the entire area of the square has been very heavily shaded over, though the outline of the underlying "X" is discernible.³¹ The designated "yes" square contains a standard "X". It is reasonable to infer from the heaving overshading of the "X" in the "no" box that the voter was attempting to obliterate the "X" which he had made therein. When this is considered in conjunction with the unequivocal "X" in the "yes" box, I find that the

²⁹ In the xerox copy of the disputed ballot, attached hereto, the shading comes out much lighter than that in the original ballot. The outline of the underlying "yes" is also more clearly discernible in the more heavily shaded original.

³⁰ *Knapp-Sherill Company*, 171 NLRB 1547, at 1548.

³¹ The Employer in its brief to the Region refers to the "X" which is admittedly there, as appearing "under the thorough blacking out." Unfortunately here again the xerox reproduction attached hereto as Exhibit B fails to reflect the heaviness of the overshading, and to a lesser extent, the clearness of the underlying "X."

voter clearly expressed his intent to vote that choice.³² Nor do I find that the markings in dispute were such as to inherently identify the voter. For the foregoing reasons the ballot was properly tabulated as a "yes" vote, and I so find.

2. *Donald Thorn*

Donald Thorn was challenged by the Board Agent because his name did not appear on the eligibility list. Both parties contend that Thorn, who is admittedly a part-time teacher, is ineligible to vote because he did not meet the definition of an eligible part-time faculty member set out in the Decision and Direction of Election.

With the consent of the parties, the Decision found eligible those part-time faculty members who were teaching part-time at the College in the fall of 1973 and who also taught at least one semester in the prior academic year (fall 1972 - spring 1973) and those teaching in the business department in the fall of 1973 who also taught in one or more of the summer sessions in 1973.

The investigation disclosed that Thorn who was employed by the Employer during the fall of 1973 as a part-time lecturer in the Natural Science Department, taught in that department during the 1973 summer term. Thorn has at no time taught in the business department and did not teach at the College on a full or part-time basis during any semester in academic 1972-73.

In view of these facts I find, in agreement with the parties, that Thorn was not eligible to vote in the election.

3. *William Lindsey*

William Lindsey³³ was challenged by the Board Agent because his name was not on the eligibility list. It is Petitioner's position that Lindsey

³²See *Gifford-Hill & Co., Inc.*, 181 NLRB 729, where the Board held as a valid "no" vote a ballot which contained an "X" in the "no" box and a single slant (diagonal) mark in the "yes" box which, according to the Board, the voter attempted to blur. The Board stated that it was reasonable "to infer from the marking in the 'yes' box that the voter, lacking an eraser, attempted to blur with his pencil the slant mark he had made." Though the method used by the voter in the case before me did not, properly speaking, consist of an attempt to blur over, the means used, namely the blacking out, just as validly reflected an intent by the voter to change or correct his choice.

³³Not to be confused with Dr. James Lindsay, referred to elsewhere in this report.

should be included in the unit and his vote counted, because he is a part-time instructor at the College, and does not fall into any of the excluded categories set forth in the unit description in the controlling decision. The Employer would exclude Lindsey as a supervisor, and as one of the College's administrative personnel.

Since July 1972, Lindsey has been serving as Director of the Community Leadership Program (CLP).³⁴ He has a full time teaching contract and a letter appointing him Director of CLP, which further advised him that his teaching load would be reduced to 3 semester hours. That in fact was his teaching load in the fall of 1973.

As Director of CLP, Lindsey is in charge of the program, administer it, and hires unit and non-unit personnel for CLP. Lindsey prepares the program's budget which he submits to the College. He is responsible for the preparation of program proposals and reports which are submitted to the Department of Education of the State of New York. (The State supplies substantial funding for the program). He consults frequently with personnel of the State Department of Education on matters relating to the program. He is in short responsible for the day to day operations of the program.

Lindsey also is responsible for staffing the program. In July 1972, he interviewed and recommended the hire of Yvonne Burton, a social worker, and in July 1973, the hire of Alice (Woods) Warren, an academic advisor and of Joyce Carbine, a language arts specialist, and all three were hired. In January 1974, he effectively recommended Carbine's termination. He oversees the work of these employees, none of whom is in the bargaining unit. Lindsey

³⁴ CLP is a program at the College designed to encourage and assist minorities and/or educationally deprived students.

has authorized Alice Warren to hire college students to serve as paid tutors for CLP students, and students have been hired under his authorization.

In the fall of 1973 Lindsey selected four members of the college faculty, all unit personnel, to conduct developmental seminars for program students.³⁵ Lindsey negotiated with each of these faculty members the remuneration each was to receive, within the limits of his budget. In addition, Lindsey selected Tom Guglielmo, a unit employee, to teach a mathematics course to CLP students during intersession (January) 1974. Lindsey estimates that he spends more than three-fourths of his time administering the CLP program, and less than one-fourth of his time teaching and preparing for teaching.

From the foregoing it is clear that Lindsey spends by far the greater portion of his time in administrative and supervisory functions. He has an effective voice in the hire and retention of the CLP staff (non-unit employees) and is responsible for their work. His supervisory responsibilities are a regular and continuing part of his work.

With respect to unit employees, he selected the faculty members to conduct the developmental seminars and negotiated their rates of compensation.

In light of all of the above, I shall exclude Lindsey from the bargaining unit. I base my decision on the following factors.

1. He is a supervisor within the meaning of the Act with respect to bargaining unit personnel.
2. In view of his supervisory functions and the fact that they together with his administrative functions³⁶ form by far the major portions of his work, and his teaching load takes up a relatively small amount of his time, I find that Lindsey does not share a sufficient community of interest with the unit employees to justify his inclusion in the unit.

³⁵The following persons were hired under the program to teach in their respective specialties: Dorothy Balancio, sociology; Ronald Rebhuhn, history; William McManus, psychology; Sister Jean Marie Neillis, biology.

³⁶“Administrative personnel” are excluded from the bargaining unit by agreement of the parties. There is no discussion or definition of the term in the record of the hearing.

Accordingly, I sustain the challenge to his ballot and direct that it not be opened.

4. *Neil Judge*

Neil Judge was challenged by the Board Agent because his name was not on the eligibility list. It is Petitioner's position that Judge should be included in the unit, and his vote counted because he shares a close community of interest with unit personnel as a result of his teaching courses and coaching duties at the College. The employer would exclude Judge from the unit for one or both of the following reasons: he is a supervisor within the meaning of the Act; and he is one of the College's "administrative personnel" as that term is used in the Decision and Direction of Election in this case.

The investigation discloses that during the academic year 1972-1973, Judge held the title of Co-ordinator of Athletics under a twelve-month administrative letter of appointment. Judge also taught 8 hours in the fall semester and 6 hours during the spring semester, although he did so without a supplemental teaching contract or additional remuneration. During that same period he served as coach of the soccer, men's and women's basketball teams and the baseball team. He was also in charge of the intramural basketball program at the College.

This year, academic 1973-74, Judge holds the title of Director of Athletics and is employed under a twelve-month administrative letter of appointment similar to those entered into by the President, Deans, and other administrative personnel of the College all of whom the parties stipulated out of the bargaining unit. He also has a supplemental contract (in letter form) to teach 3 hours per semester. In point of fact, according to Judge, he teaches 6 credit hours per semester, but because the course enrollment is not large enough for two classes he receives compensation for only 3 credit hours. Judge has a bachelors degree in Physical Education.

In his position as Director of Athletics, Judge is responsible for the scheduling of varsity sports events, preparing the department's budget, and for procuring athletic equipment within the budget assigned him.

Judge's coaching duties during the present academic year (1973-74) include soccer, men's basketball, and baseball. Judge hired John Mc Mahon, a student and a member of the men's basketball team, and not a unit employee, to coach the women's basketball team this season. He supervises Mc Mahon's work.

Ronald Rehbuhn, a faculty member at the College, is serving in a voluntary, non-paid capacity as a tennis coach. Judge learned of the arrangement for the first time when he was informed of it by Paul Hughes, Dean for Student Affairs. Judge states that during 1972-73 he had minimal or no duties with respect to tennis and that Dean Hughes had scheduled tennis matches for the current academic year. However, Judge is now scheduling tennis matches for 1974-75. Judge has also enlisted the aid of a student on a voluntary basis as assistant men's basketball coach, and he supervises his work. But the student receives no remuneration of any kind for his work.

Based on the time he spent in his various duties during the past academic year (1972-73) and the present year to date (to approximately March 1, 1974), Judge will spend approximately 65% to 70% of his time during academic 1973-74 in coaching and teaching, and approximately 30% to 35% in administrative duties. These figures will vary generally with the sport in season. Thus during the month of September, 1973 he estimates he spent the majority of his work week in administrative duties connected with his athletic responsibilities; perhaps two-thirds of his time was so spent. However from October 1973 to mid-March 1974, which Judge labels his basketball season, he spends perhaps 30% of his time in administrative work, but much more in coaching which includes not only team practice but time spent at the games themselves.

Baseball predominates from about March 15 to sometime in May, and here again his administrative duties consumes perhaps 25% of his time; coaching and teaching the remainder. From late May to about September 1, Judge is not involved in any school function except for a few days which he spends on administrative details. As indicated earlier, Judge is teaching 6 hours during the academic year, to which must be added some preparatory time. In the overall, and computed on an annual basis, Judge spends well over 50 percent of his working time in non-administrative duties.

In support of exclusions, the Employer contends first that Judge is a supervisor having authority of the type described in Section 2(11) of the Act; and specifically points to Judge's supervision of the tennis coach, of John McMahon, the paid women's basketball coach, and the assistant basketball coach. But the investigation establishes that Rehbuhn, the tennis coach and a faculty member, was not enlisted by Judge who first learned of the appointment from Dean Hughes, Judge's superior, on terms arranged by Hughes, terms which incidentally involved no compensation. At no time relevant hereto has Judge exercised any responsible supervisory authority over Rehbuhn. In fact his control over the tennis program itself was minimal or nonexistent until recently when, for the first time, he began to schedule team matches (for the 1974-75 season). Based on the foregoing, I find that Judge is not a supervisor within the meaning of the Act, insofar as Rehbuhn is concerned.³⁷

With regard to McMahon, and the assistant men's basketball coach, both of whom are students at the College and non-unit personnel, Judge exercises

³⁷ There is some question whether in view of the voluntary non-compensated nature of Rehbuhn's employment relationship with the College, he would qualify as an employee under the Act insofar as his tennis work is concerned, but I make no finding on this point.

supervisory authority. Both were selected by Judge, and it is Judge who responsibly directs their work.³⁸

In *New York University, supra*, the Board, apropos the supervisory status of professional librarians, stated it would exclude as supervisors "only those professional librarians who supervise other employees in the unit or who spend more than 50 percent of their time supervising nonunit employees."³⁹ Judge's supervisory responsibilities for the two student coaches take up well below 50 percent of his working time. To the extent that the Employer contends that Judge should be excluded because he is a supervisor of non-unit employees, I find the contention without merit and hereby overrule it.

In further support of exclusion, the Employer contends that Judge is one of the College's administrative personnel, as that term is used in the unit exclusion set forth *supra*. However, the record sheds no very clear light on the meaning which the parties intended to give to the term "administrative personnel." The Employer points to the College's last two catalogs where Judge is listed exclusively as an administrator whereas everyone eligible to vote, so it is alleged, is listed as faculty. An examination of the two catalogs, for 1972-73 and 1973-74, does not give unambiguous support to this claim. For while it is true that Judge is listed under one of the several subdivisions of the Faculty of Administration and not at all under the Faculty of Instruction, I note that Irving Koslowe, listed only in the administrative section as Director, Law Enforcement Education

³⁸ With respect to the non-compensated student assistant, there is again, as with Rehbuhn, a question that he is an employee within the meaning of the Act. If anything this individual's employment relationship is even more nebulous than Rehbuhn's.

³⁹ In *Manhattan College*, 195 NLRB 65, 66, the Board found athletic coaches to be professional employees under Section 2(12) of the Act. The coaches included two full time, four part-time (with no teaching responsibilities), and one coach who also taught. They all had academic degrees and at least one had a master's degree. Judge has an academic degree.

Program, was on the eligibility list prepared by the Employer and voted without challenge.⁴⁰

The Employer also contends that Judge does not attend faculty meetings or vote in faculty elections and this appears to be true.

In evaluating the evidence on Judge, it is clear he is a multi-function employee, engaged in administrative, coaching and teaching duties. But in fact coaching athletics is looked upon by the Board as a function "closely related to teaching," and athletic coaches have been included with professional faculty in a college unit.⁴¹ And there is no doubt that Judge spends a very substantial part of his time in coaching. When his coaching work is combined with his conventional teaching, Judge is found to spend a majority of his time in non-administrative work.

In discussing the unit placement of dual function employees who exercise both administrative and teaching functions, the Board, in *Florida Southern College*,⁴² excluded those employees whose work was "primarily administrative" but included those holding administrative positions who appeared to have "a direct community of interest with the full time faculty and spend a substantial portion of their time using those professional qualifications in work functions similar to the full time faculty . . ."⁴³ I find that Judge's work is not primarily administrative and that he spends a substantial portion of his time in

⁴⁰ There are other ambiguities in the catalog listings. Thus department chairmen and also deans are listed under both faculties, administration and teaching. Yet the former were eligible to vote; the latter ineligible.

⁴¹ *Manhattan College, supra.*

⁴² 196 NLRB 888, at 889-890.

⁴³ *Ibid.* In *Manhattan College*, the Board in describing the work of non-teaching athletic coaches found them to be using their professional qualifications in functions closely related to teaching, though it did not use the precise language quoted above from *Florida Southern College*.

coaching and teaching, and further, that he has a substantial community of interest with the faculty.⁴⁴ For these reasons I find that the challenge to the ballot of Judge to be unfounded.

CONCLUSIONS

Having found all of the objections of the Employer and the Petitioner to be without merit, they hereby are overruled.

Having found the challenges by the Petitioner and the Employer to the ballots attached hereto as Exhibits A and B, respectively, as without merit, I hereby reaffirm their validity and their inclusion in the tally served on the parties.

Having found Donald Thorn and William Lindsey to be ineligible voters, I direct that the challenges to their ballots be sustained and that their ballots not be opened and counted.

Having found that Neil Judge is an eligible voter, I hereby overrule the challenge to his ballot and direct that it be opened and counted at a date to be fixed by me, and that thereafter an appropriate certification issue.⁴⁵

Dated: New York, New York

March 7, 1974

s/s SIDNEY DANIELSON

Sidney Danielson, Regional Director
Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10007

⁴⁴ That he does not attend or vote at faculty meetings is in itself not determinative of the issue. In *Florida Southern College, suprc*, where the Board included dual function employees, it found that "most, if not all" of the group of six employees in question enjoyed faculty status and did vote. Thus, the Board was prepared to include them even if only "most" and not necessarily all, enjoyed faculty status and voted. In *Manhattan College, supra*, I note that the eligible coaches were not part of the academic faculty insofar as their coaching functions were concerned. Some of the coaches there did no teaching; only coaching.

⁴⁵ Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by March 20, 1974.

EXHIBIT F

[57134 EVDAE

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RAAUIHZ RUEVDEL0003 1201955-UUUU-RUEVDAE.

FM MARIO A LAURO JR ASST EXEC SECY WASH DC NLRB

IO RUEVDAE/4/Saul G Kramer Esq Proskauer Rose Goetz and Mendelson

300 Park Ave NewYork NY

TO RUEVDAE/4/Jack J Sissman Esq Eugene M Kaufman Esq 260 Park Ave

South NewYork NY

TO RUEVDAE/4/Mercy College Faculty Council Attn Dr Ann Grow Nand

Richard E Miller Pres 555 Broadway Dobbs Ferry, NewYo k

TO RUEVDAE/4/NLRB NewYork NY

ST

RE Mercy College 2-RC 16181. Employers request for review of regional directors supplemental decision is hereby granted with respect to objection 1 as it raises substantial issues warranting review. In all other respects the request for review is denied by direction of the board:

ST

NNNN

[57134 EVDAE

* * * *

RE: MERCY COLLEGE 2-RC-16181

DEAR MR. TRUESDALE:

WE REQUEST RECONSIDERATION OF ISSUE TWO IN THE EMPLOYER'S REQUEST FOR REVIEW IN THE ABOVE MATTER IN LIGHT OF THE SUPREME COURT DECISION IN NLRB V. TEXTRON, INC., 85 LRRM 2945 (APRIL 23, 1974).

SINCERELY YOURS,

MARVIN DICKER

* * * *

EXHIBIT G

34 EVDAE

163214 [13013 MSCEV410225

RAAUIJHZ RUEVDEL0001 1341400-UUUU-RUEVDAE.

FM Robert Volger Deputy Exec Secy Wash DC NLRB

TO RUEVDAE/4/Marvin Dicker Esq Saul G Kramer Esq Proskauer Rose Goetz
and Mendelson 300 Park Ave New York NY

TO RUEVDAE/4/Jack J Sissman Esq Eugene M Kaufman Esq 260 Park Ave
South New York NY

TO RUEVDAE/4/Mercy College Faculty Council At Dr Ann Grow and Richard
Miller 555 Broadway Dobbs Ferry NY

TO RUEVDAE/4/NLRB New York NY

ST

Re Mercy College 2-RC 16181. Employers Request for Reconsideration is hereby denied as it contains nothing not previously considered. By direction of the Board:

ST

NNNN

[57134 EVDAE

EXHIBIT H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * * * *

DECISION ON REVIEW AND ORDER

On March 7, 1974, the Regional Director for Region 2 issued his Supplemental Decision in which he overruled Employer and Petitioner's objections to conduct affecting the results of the election, sustained the challenges to two ballots, and ordered the opening and counting of the third challenged ballot cast in the election held on November 7 and 8, 1973.¹ Thereafter, pursuant to National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Supplemental Decision on the ground, *inter alia*, that he erred in overruling Employer's Objection 1 pertaining to a disputed ballot tabulated by the Board agent at the count as a "yes" vote.

By telegraphic Order dated April 30, 1974, the National Labor Relations Board granted the request for review insofar as it related to Objection 1, and denied review in all other respects.²

Pursuant to the provisions to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review and makes the following findings:

¹ The tally of ballots for the election showed that 42 eligible voters cast ballots for, and 41 against, the Petitioner. Three ballots were challenged. The challenges are determinative of the results of the election.

² On May 6, 1974, the Employer filed a telegraphic request for reconsideration of the issue relating to the challenged ballot which the Regional Director ordered opened and counted. By telegraphic Order dated May 13, 1974, the Board denied this request.

The Employer's Objection 1 relates to the action of the Board agent in counting as a "yes" vote, during tabulation of the ballots at the conclusion of the balloting, a ballot marked as follows:

PUT AN "X" IN THE SQUARE OF YOUR CHOICE



The Regional Director found that this ballot was properly tabulated as a "yes" vote. He concluded that the intent of the voter was "clearly expressed" to vote that choice. He reasoned that there was a discernible "X" in the designated "no" square which had been heavily shaded over, and the designated "yes" square contained a standard "X," thus indicating the voter's intent to vote "yes." The Regional Director concluded it was reasonable to infer from the heavy overshadowing that the voter was attempting to obliterate the "X" in the "no" square which he had made.

In disputing the Regional Director's findings with respect to the ballot in question, the Employer asserts that the applicable test is whether the voter has clearly and unequivocably indicated his choice and that where there is reasonable doubt as to the voter's intent, the ballot must be ruled void. It argues that the choice of the voter herein cannot be definitely and certainly ascertained and that the determination of the representation rights of the unit employees should not possibly turn on such an ambiguously marked ballot. Further, the Employer points out that the ballot contains the admonition "if you spoil this ballot, return to the Board Agent for a new one" and the failure of the voter here to do so, at the very least, requires a finding that the intent of the voter is unclear.

We find merit in the contentions of the Employer that the intent of the voter here is not free from doubt and a ballot so marked should not be considered in determining the representation rights of the unit employees.

In finding a ballot to be valid the Board requires that the intent of the voter in marking his ballot must be clearly expressed. Here the markings in either of the designated squares, absent the marking in the other square, would be considered a clear indication of the intent of the voter.³ However, inasmuch as both designated squares have been marked in such a manner, the true intent of the voter cannot, in our judgment, be ascertained with the required degree of certainty. We deem as inadequately supported speculation the inference drawn by the Regional Director that the voter was attempting to obliterate his initial choice. Rather, we deem this is a spoiled ballot which should not be counted. Accordingly, we find this ballot to be void⁴ and we shall remand the case to the Regional Director for the purpose of opening and counting the sole remaining challenged ballot and issuing a revised tally of ballots.

It is hereby ordered that the instant case be, and it hereby is, remanded to the Regional Director to open and count the challenged ballot and issue a revised tally of ballots and an appropriate certification.

Date, Washington, D.C. August 16, 1974

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

³ *Bridgeton Transit*, 124 NLRB 1047

⁴ *Gerber Plastic Company*, 110 NLRB 260; *Dornback Furnace & Foundry Company*, 115 NLRB 350; *Jefferies Banknote Co.*, 116 NLRB 265.

MEMBER FANNING, dissenting:

Citing *Gifford-Hill & Co., Inc.*, 181 NLRB 729, the Regional Director found that the voter had clearly expressed his intent to vote yes by an unequivocal "X" in the "yes" box, considered in conjunction with the faint "X" in the "no" box which was "heavily shaded over." Of considerable interest in this connection is the decision of the United States Court of Appeals for the First Circuit in *N.L.R.B. v. Whitinsville Spinning Ring Company*, 199 F.2d 585, 588 (1952), dismissing the Board's petition for enforcement of a bargaining order. Because of erasure in the "yes" box, the Board there found the determinative ballot "clearly spoiled and mutilated" though the "X" in the "no" box was clear. The court said:

Undoubtedly the Board in the exercise of the wide discretion powers conferred upon it by Congress could within the democratic framework have adopted a rigid policy or practice of regarding all ballots marked in an unorthodox manner as mutilated and therefore void, in order to avoid disputes over ballots and thus expedite counting and the determination of bargaining representatives. It has not done so, however, but instead it has adopted a more liberal policy in conformity with the view which apparently prevails in this country with respect to political elections . . . We must confess that we can find no logical reason why the Board should single out an erasure, or an attempt at erasure, on a ballot for special treatment by considering all such ballots necessarily mutilated and therefore void. Moreover, it seems to us only fair that a voter should be apprised of such an extraordinary rule. While the statement printed on the ballot directed the voter to obtain a new ballot if he "spoiled" the original one, the word "spoiled" was in no way defined, and it is difficult for us to say that the average voter would consider a ballot "spoiled" merely because it contained a slight erasure. If departure from orthodoxy in marking ballots is to be countenanced by the Board at all, as it clearly is from the decisions cited above, then, in the absence of any question of voter identification, the problem is, as the Board has repeatedly held, to discover if possible the voter's intent.

Here is is reasonable to conclude that the voter intended to obliterate, by

pencil rather than erasure, the "X" he had placed in the "no" box and did not consider the ballot spoiled merely because of this fact. I agree that the ballot was properly tabulated as a "yes" vote, as recommended by the Regional Director.

Dated, Washington, D.C. August 16, 1974.

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

Form NLRB-4168
(1-52)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the winter of

MERCY COLLEGE

301

MERCY COLLEGE FACULTY COUNCIL
Petition

Case No. 2-RC-16181

Date issued August 26, 1974

Type of election (Check one):

- Consent Agreement
- Stipulation
- Board Direction
- R. D. Direction
- 8 (b) (7)

REVISED TALLY OF BALLOTS

(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director on
August 26, 1974 and the addition of these ballots to the original Tally of
Ballots, executed on Nov. 8, 1973, were as follows:

1/ Corrected to reflect Board's For the Regional Director
Decision and Order on Review, declaring *Alexander P. Rosenblatt*
one (1) "yes" ballot to be void.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

FOR EMPLOYER FOR PETITIONER

FOR FCR

FORM NLRB-4279
(1-72)

RC-RH-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

HERCY COLLEGE		Employer	and	HERCY COLLEGE FACULTY COUNCIL Petitioner	Case No. 2-RC-16131
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TYPE OF ELECTION

(Check one)

Consent Agreement
 Stipulation
 Board Direction
 RD Direction

(Also check box
below where
appropriate)

8(b)(7)

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,
 IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for HERCY COLLEGE
 FACULTY COUNCIL.

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT: EXCLUDED: All full time and regular part time members of the faculty employed by the Employer including department chairmen, assistant library director and reader services librarians.

EXCLUDED: Administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.

Signed at New York, N. Y.
 On the 30th day of August 19 74

On behalf of

NATIONAL LABOR RELATIONS BOARD

Silvia M. Minkler
 Regional Director, Region 2
 National Labor Relations Board



NATIONAL LABOR RELATIONS BOARD

Exhibit K

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.		DO NOT WRITE IN THIS SPACE	
		Case No.	2-C-A-13565
		Date Filed	12/24/74
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
a. Name of Employer MERCY COLLEGE	b. Number of Workers Employed about 85		
c. Address of Establishment (Street and number, city, State, and ZIP code) 555 BROADWAY, DOBBS FERRY, N.Y. 10522	d. Employer Representative to Contact DR. DONALD GRUNEWALD	e. Phone No. 914-693-4500	
f. Type of establishment (Factory, mine, wholesaler, etc.) COLLEGE	g. Identify Principal Product or Service EDUCATION		
b. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and 5 (Title: subsections) and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.) In breach and violation of the employer's duty to bargain collectively with Mercy College Faculty Council ("Council"), the duly certified collective bargaining representative of all of employer's faculty members (certified as such on August 30, 1974 in Case No. 2-RC-16181) and the Council's written demand for collective bargaining negotiations, the employer has on September 25, 1974 and at all times thereafter, willfully refused to bargain collectively with the Council. (Photo-copies of the Council's written demand for collective bargaining negotiations and the employer's written refusal to bargain collectively are annexed hereto and made a part hereof.)			
By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.			
3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number) MERCY COLLEGE FACULTY COUNCIL			
4a. Address (Street and number, city, State, and ZIP code) C/O Dr. Mavis Gill 214-18 33rd Avenue, Bayside, N.Y. 11361		4b. Telephone No. 914-693-4500 or 212-423-4218	
5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization) UNAFFILIATED			
6. DECLARATION			
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief. <i>[Signature]</i>			
By _____ (Signature of representative or person filing charge)		SECRETARY (Title, if any)	
Address 214-18 33rd Avenue Bayside, N.Y. 11361		914-693-4500 or 212-423-4218 (Telephone number)	
		December 19, 1974 (Date)	
WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1911)			

Attorneys for Charging Party: Waldman & Waldman, 501 Fifth Avenue, New York, N.Y. 10017 (Tel: MO. 1-1230) GPO 861-475

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

* * * *

COMPLAINT AND NOTICE OF HEARING

Ir having been charged by Mercy College Faculty Council, herein called the Faculty Council, that Mercy College, herein called the Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, Region 2, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations – Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The Charge in this proceeding was filed by the Faculty Council on December 24, 1974, and served by registered mail upon Respondent, on or about December 26, 1974.
2. (a) Respondent is, and has been at all times material herein, a private nonprofit college located in Dobbs Ferry, New York.
(b) During the past year, which period is representative of its annual operations generally, Respondent derived gross revenues from all sources in excess of one million dollars of which in excess of \$50,000 was derived from sources located outside the State of New York.
3. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. The Faculty Council is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. On or about May 17, 1973 the Faculty Council filed a petition for certification as representative of Respondent's full-time members of faculty of instruction and librarians.

6. All full-time and regular part-time members of the faculty including department chairmen, assistant library director and reader service librarians, employed by Respondent at its college, exclusive of all other employees, administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, guards, watchmen and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. On or about July 12, 1973, pursuant to a Decision and Direction of Election by the Acting Regional Director, Region 2, an election was directed in the unit of Respondent's employees described above in paragraph 6.

8. On or about August 3, 1973, Respondent's timely Request for Review of the Acting Regional Director's Decision and Direction of Election was denied by Direction of the Board.

9. On or about November 7 and November 8, 1973, a majority of the employees of Respondent, in the unit described above in paragraph 6, by a secret election conducted under the supervision of the Regional Director, Region 2, of the Board designated and selected the Faculty Council as their representative for the purposes of collective bargaining with Respondent.

10. On or about November 14, 1973, the Faculty Council and Respondent filed timely objections to the conduct affecting the results of the election described above in paragraph 9.

11. Thereafter, and on or about March 7, 1974, the Regional Director,

Region 2, issued a Supplemental Decision in which he overruled the Faculty Council's and Respondent's objections to conduct affecting the results of the election, sustained challenges to two ballots, and ordered the opening of a third challenged ballot cast in the election described above in paragraph 9.

12.(a) On or about April 4, 1974, Respondent filed a timely Request for Review of the Regional Director's Supplemental Decision with the Board.

(b) Thereafter, and on or about April 30, 1974, the Board granted Respondent's Request for Review insofar as it related to objection one (1) of Respondent's objections to conduct affecting the results of the election; but denied it in all other respects.

13.(a) On or about May 6, 1974, Respondent requested reconsideration by the Board of its denial of Respondent's Request for Review except insofar as it related to objection one (1) of Respondent's objections to conduct affecting the results of the election.

(b) Thereafter, and on or about May 13, 1974, the Board denied Respondent's request for reconsideration of Respondent's Request for Review.

14. On or about August 16, 1974, the Board issued its decision in 212 NLRB No. 134 and found the challenged ballot to be void, and remanded the case to the Regional Director, Region 2, to open and count the challenged ballot and issue a revised tally of ballots and an appropriate certification.

15. On or about August 30, 1974, said Regional Director certified the Faculty Council as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 6, and at all times since said date, the Faculty Council, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

16. On or about September 5, 1974, the Faculty Council requested Respondent to bargain collectively with it as the exclusive collective-bargaining

representative of Respondent's employees in the unit described above in paragraph 6, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of such employees.

17. Since on or about September 25, 1974, Respondent has refused to bargain collectively with the Faculty Council as the exclusive collective-bargaining representative of Respondent's employees in the unit described above in paragraph 6.

18. By the acts described above in paragraph 17, and by each of said acts, Respondent, refused to bargain collectively, and is refusing to bargain collectively, with the representative of its employees, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and Section 2(6) and (7) of the Act.

19. By the acts described above in paragraph 17 and by each of said acts, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

20. The acts of Respondent described above in paragraph 17, occurring in connection with the operations of Respondent described above in paragraphs 2 and 3, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 1st day of April 1975 at 11:00 a.m., at 26 Federal Plaza, Room 3614, in the City and State of New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise and give testimony.

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You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, Region 2, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

Dated at New York, New York this 6th day of February 1975.

/s/SIDNEY DANIELSON

Sidney Danielson, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10007

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MERCY COLLEGE,	Respondent.	RESPONDENT'S ANSWER
and		
MERCY COLLEGE FACULTY COUNCIL,	Petitioner.	Case No. 2-CA-13565

Respondent, by its attorneys, answering the complaint alleges:

1. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 of the complaint, except admits that the charge alleged in paragraph 1 of the complaint was served upon it by registered mail.
2. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 4 of the complaint.
3. Denies the allegations contained in paragraph 6 of the complaint.
4. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 8 of the complaint except admits that on or about August 3, 1973 Respondent received notice that its timely Request for Review of the Acting Regional Director's Decision and Direction of Election was denied.
5. Denies the allegations contained in paragraph 9 of the complaint except admits that on or about November 7 and November 8, 1973, a secret ballot election was conducted under the supervision of the Regional Director, Region 2, of the Board in the unit described in paragraph 6 of the complaint.
6. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 12(b) of the complaint

except admits that on or about April 4, 1974, Respondent filed a timely Request for Review described in paragraph 12(a) of the complaint and that on or about April 4, 1974, Respondent filed a timely Request for Review described in paragraph 12(a) of the complaint and that on or about April 30, 1974 Respondent received notice that its Request for Review was denied.

7. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 13(b) of the complaint except admits that on or about May 6, 1974, Respondent requested reconsideration of Respondent's Request for Review described in paragraph 12 of the complaint and that on or about May 13, 1974 Respondent received notice that its request for reconsideration of Respondent's Request for Review was denied.

8. Denies the allegations contained in paragraph 16 of the complaint except admits that on or about September 5, 1974 the Faculty Council requested Respondent to engage in collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

9. Denies the allegations contained in paragraph 17 of the complaint except admits that on or about September 15, 1974 Respondent refused and has continued to refuse to recognize and to bargain collectively with the Faculty Council.

10. Denies the allegations contained paragraphs 18, 19 and 20.

As and For a First Affirmative Defense

11. The Regional Director allowed the ballot cast by Neil Judge, a proven administrator and supervisor, to be counted in the secret ballot election held on November 7 and 8, 1973, despite the fact that administrators and supervisors were excluded from the unit under the Regional Director's own Direction of Election.

As and For a Second Affirmative Defense

12. A misrepresentation of the Middle States Association's Report made by the Petitioner the day before the election, described in paragraph 11 above, destroyed the laboratory conditions for the election.

As and For a Third Affirmative Defense

13. The denial of an evidentiary hearing with respect to the Neil Judge challenge, described in paragraph 11 above, and the misrepresentation objection, described in paragraph 12 above, in view of the sharp credibility issue raised by the affidavits submitted to the Regional Director constituted a violation of due process.

As and For a Fourth Affirmative Defense

14.(a) The decision by the Board on or about August 3, 1973 to deny the Respondent's Request for Review submitted on or about July 23, 1973 was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one Board member and two staff assistants.

(b) The decision by the Board on or about April 30, 1974 to deny Respondent's Request for Review submitted on or about April 4, 1974, except insofar as it related to objection one of Respondent's objections, was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one Board member and two staff assistants.

(c) The decision by the Board on or about May 13, 1974 to deny Respondent's Request for Reconsideration of its Request for Review, described in paragraph 14(b) above, submitted on or about May 6, 1974, was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one Board member and two staff assistants.

WHEREFORE, Respondent demands that the complaint be dismissed.

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Mercy College

S/S MARVIN DICKER

BY MARVIN DICKER
Marvin Dicker,
A Member of the Firm
300 Park Avenue
New York, New York 10022

Dated: New York, New York
February 18, 1974

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MERCY COLLEGE,	Respondent.	AMENDMENT TO RE- SPONDENT'S ANSWER
and		
MERCY COLLEGE FACULTY COUNCIL,	Petitioner.	Case No. 1-CA-13565

Respondent, by its attorneys, amends its answer to the complaint and alleges:

As and For a Fifth Affirmative Defense

15. The Regional Director allowed the Petitioner to call itself by an incomplete and misleading name throughout the campaign and election.

WHEREFORE, Respondent demands that the complaint be dismissed.

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Mercy College

S/S MARVIN DICKER

BY MARVIN DICKER
Marvin Dicker,
A Member of the Firm
300 Park Avenue
New York, New York 10022

Dated: New York, New York
March 19, 1975

EXHIBIT O
January 13, 1975

Mr. Abraham Borenstein
National Labor Relations Board
Region 2
26 Federal Plaza
New York New York 10007

Re: Mercy College

Case No. 2-CA-13565

Dear Mr. Borenstein:

On behalf of Mercy College, we submit this letter as a statement of our position in the above matter. We maintain that the Petitioner was improperly certified and that the unfair labor practices Charge filed against Mercy College on December 24, 1974 should be dismissed for the reasons set forth herein.

1. The Regional Director allowed the ballot cast by Neil Judge, a proven administrator and supervisor, to be counted in the representation election held on November 7 and 8, 1973, despite the fact that administrators and supervisors were excluded from the unit under the Regional Director's own direction of election.

2. A misrepresentation of the Middle States Association's Report made by the Petitioner the day before the election destroyed the laboratory conditions for the election.

3. The denial of an evidentiary hearing with respect to the Neil Judge challenge and the misrepresentation objection in view of the sharp credibility issue raised by the affidavits submitted to the Regional Director constituted a violation of due process.

4. The decision by the Board to deny the Employer's Request for Review on all but one of its objections was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one

Board member and two staff assistants.

To enable us to prepare our defense to the unfair labor practices Charge, we request the following materials: All documents, papers and records, including agenda, memos, case summaries, etc. of the National Labor Relations Board and particularly members Miller, Jenkins and Fanning, their agents, employees, attorneys and assistant and Robert Volger, his agents and assistants and in particular any such documents, papers and records in the Review Section of the Board relating to consideration of the Employer's Request for Review.

Sincerely yours,

/s/MARVIN DICKER

Marvin Dicker

MD:ds1

EXHIBIT P

February 3, 1975

Re: Mercy College

Cases 2-CA-13565

2-RC-16181

Marvin Dicker, Esquire

Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, NY 10022

Dear Mr. Dicker:

Regional Director Sidney Danielson has referred to me your letter of January 13, 1975 (but postmarked January 15), for consideration of the requests for documents, etc., contained in paragraph 4.

You assert that the decision by the Board to deny in part the Employer's Request for Review was made by one Board Member and two staff assistants. This is not a correct statement. The decision was in fact made personally by Chairman Miller and Members Fanning and Jenkins after personal consideration by them of the said Request for Review. As the Board noted in its Supplemental Decision in *KFC National Management Company*, 214 NLRB No. 29, the Board revised its procedures in the latter part of 1973 so as to assure the personal participation of the Board Members in all final decisions on whether or not to grant review. In accordance with this procedure, the Board Panel personally decided to deny in part the Employer's Request for Review and directed Deputy Executive Secretary Robert Volger to issue a telegraphic order to that effect.

The documents which you request relate to the deliberative processes of the Board in its adjudication of this case. Their disclosure is not required because to do so would be destructive of adjudicatory responsibility and administrative integrity. *Sear, Roebuck and Co. v. N.L.R.B.*, 433 F.2d 210

(C.A. 6); *United States v. Morgan*, 313 U.S. 409, 422. See also *N.L.R.B. v. Botany Worsted Mills*, 106 F.2d 263, 267 (C.A. 3); *Davis v. Braswell Freight Lines*, 363 F.2d 600; *N.L.R.B. v. Biles-Coleman Lumber Co.*, 98 F.2d 16, 17 (C.A. 9); *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964-5 (C.A. 5). This principle of protection of the deliberative processes of an agency has been preserved by the Public Information Act. That statute requires only the public availability of final opinions and orders of the agency. Section (b) (5), 5 U.S.C. Section 552(b) (5), specifically exempts from disclosure intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. It is clear from the legislative history of that exemption that it was intended to protect from disclosure the deliberations and advice of agency staff and personnel. H. Rept. 1497, 89th Congress, 2d Sess., p. 10. See also *Attorney General Memorandum on the Public Information Section of the Administrative Procedure Act*, U.S. Department of Justice, June 1967, p. 35.

For the foregoing reasons, I am instructed to advise you that the request contained in the final paragraph of your letter of January 13, 1975, must be, and hereby is, denied.

Sincerely

/s/JOHN C. TRUESDALE

John C. Truesdale

Executive Secretary

cc: Sidney Danielson, Director, Region 2

EXHIBIT Q

* * * *

February 11, 1975

Mr. John C. Truesdale
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: *Mercy College Cases 2-CA-13565; 2-RC-16181*

Dear Mr. Truesdale:

We are in receipt of your letter dated February 3, 1975 in which you assert that the decision to deny the Employer's Request for Review in Case Number 2-RC-16181 was not made by one Board member and two staff assistants.

You indicated in your letter that the decision to deny, in part, the Request for Review was made personally by Chairman Miller and members Fanning and Jenkins. You support your position by referring to the Board's Supplemental Decision in *KFC National Management Company*, 214 NLRB No. 29 [(October 27, 1974)^{*}] in which it was noted that the Board had revised its procedures in the latter part of 1973 so as to assure the personal participation of Board members in all final decisions on whether or not to grant review. Thus, only Board members could have made the final decision on the Request for Review issued in this case on April 30, 1974.

On July 23, 1973, the Board denied the Employer's Request for Review filed after the issuance of the Decision and Direction of Election by the Regional Director. It is our contention that the change in Board procedure, described in the *KFC* case, occurred after this date. Thus, this denial of the Employer's Request for Review was in violation of the quorum requirement

^{*} The precise date of this decision is crucial in determining at what point the employer can be charged with having knowledge of the revision in policy.

of the Act, as amended, since that decision was reached by only one Board member and two staff assistants.

We further contend that the quorum requirement was again violated on May 13, 1974 when the Board denied the Employer's Request for Reconsideration of its Request for Review in light of the Supreme Court decision in *NLRB v. Textron, Inc.*, 85 LRRM 2945 (April 23, 1974).

Finally, we still lack any evidence other than a statement issued in October 1974 that procedures were changed in late 1973 to conform with the decision of the Court of Appeals dated May 8, 1974.

To enable us to prepare our defense to the unfair labor practice charges, we request the following materials: All documents, papers and records, including agenda, memos, case summaries, etc. of the National Labor Relations Board and particularly members Miller, Jenkins and Fanning, their agents, employees, attorneys and assistants and Robert Volger, his agents and assistants and in particular any such documents, papers and records in the Review Section of the Board relating to consideration of the Employer's Request for Review, after the issuance of the Regional Director's Decision and Direction of Election, the subsequent Request for Review after the election and Request for Reconsideration.

Very truly yours,

Marvin Dicker

MD:dsl

cc: Sidney Danielson,
Director, Region 2

EXHIBIT R

* * * * *

RE MERCY COLLEGE 2-RC-16181 AS IT NOW APPEARS THAT THE BOARD'S TELEGRAPHIC ORDER OF AUGUST 2, 1973, DENYING THE EMPLOYER'S REQUEST FOR REVIEW HEREIN MAY BE SUBJECT TO A PROCEDURAL INFIRMITY, A PANEL OF THE BOARD, CONSISTING OF MEMBERS FANNING, KENNEDY, AND PANELLO. HAS THEREAFTER PERSONALLY CONSIDERED SAID REQUEST FOR REVIEW ON ITS MERITS AND CONCLUDED THAT ON AUGUST 2, 1973, AND THEREAFTER, IT RAISED NO SUBSTANTIAL ISSUES WARRANTING REVIEW. ACCORDINGLY, SAID REQUEST FOR REVIEW IS HEREBY DENIED NUNC PRO TUNC.

BY DIRECTION OF THE BOARD:

* * * * *

EXHIBIT S

* * * * *

March 14, 1975

Mr. John C. Truesdale
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: *Mercy College Cases 2-CA-13565; 2-RC-16181*

Dear Mr. Truesdale:

We received on March 13, 1975 a telegram from the National Labor Relations Board indicating that a "procedural infirmity" occurred when the

Board denied the Employer's Request for Review in the above representation case on August 2, 1973. Apparently, this telegram was in response to my letter of February 11, 1975 asking for certain information from the Board. In view of the telegram of March 13, 1975 and the allegations in the complaint in the above-captioned unfair labor practice proceeding, the following information and documents to support it are absolutely necessary for us to proceed in these matters:

- 1) The nature and quality of the "procedural infirmity" that occurred on August 2, 1973.
- 2) The nature and quality of any and all "procedural infirmities" which may have surrounded the Board's denial of the Employer's Request for Review of the Regional Director's supplemental decision on April 30, 1974.
- 3) The nature and quality of the "procedural infirmities", if any, surrounding the denial on or about May 13, 1974 of the Employer's Request for Reconsideration of its Request for Review.

In supplying this information it will be necessary to know which members of the Board, if any, attended and acted upon each of the above cited requests.

We again renew the requests and inquiries in our February 11, 1975 letter which have not, as of this date, been answered.

Very truly yours,

/s/ MARVIN DICKER

Marvin Dicker

MD: dsl

cc: Sidney Danielson,
Director, Region 2

EXHIBIT T

* * * * *

March 14, 1975

Mr. Marvin Dicker
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Re: *Mercy College Cases 2-CA-13565; 2-RC-16181*

Dear Mr. Dicker:

Your letter of January 13, 1975, to Mr. Borenstein, which was forwarded to me for consideration, referred in paragraph 4 only to "the decision by the Board to deny the Employer's Request for Review on all but one of its objections. . ." My reply of February 3, 1975, was responsible only to that request and therefore furnished information with respect to the Board's telegraphic order of April 30, 1974 (granting the Employer's Request for Review as to objection 1 and denying the request in all other respects). Your letter of February 11, 1975, now broadens your prior request for information.

With respect to your current request for information concerning the Board's telegraphic order of May 13, 1974, denying the Employer's Request for Reconsideration, the decision to deny said request was made personally by Chairman Miller and Members Fanning and Jenkins after consideration by them of the said Request. Thus, this Panel of the Board decided personally to deny the Employer's Request for Reconsideration and directed Deputy Executive Secretary Robert Volger to issue a telegraphic order to that effect.

The Board's telegraphic order of August 2, 1973 (not July 23, 1973) denying the Employer's July 24, 1973, Request for Review of the Acting

Regional Director's Decision and Direction of Election, was issued after consideration by one Board Member and two staff assistants representing two other members. As our records do not affirmatively establish that the two absent members ratified or approved the decision to deny review, the decision thereon may suffer from the same infirmities pointed out by the Court in *KFC National Management Corporation*, 497 F.2d 298. Therefore, a panel of the Board has denied said Request for Review *nunc pro tunc*, a copy of which has been forwarded to you by telegram. I am enclosing a docket card maintained by the Office of Representation Appeals which constitutes the record vote in this case and which carries the notation of the Board Members who participated in the decision. Also enclosed is a file copy of the telegraphic order in that case which also reflects the members who participated in such decision.

The balance of the documents you request in the final paragraph of your letter of February 11, 1975, relate to the deliberative processes of the Board in its adjudication of this case. Accordingly, your request is denied for the reasons given in my letter of February 3, 1975.

To the extent you deem any portion of this response an adverse determination of your request for records, Sec. 102.117(c)(2)(iii)* provides that in the event you wish to appeal, such appeal must be filed with the Chairman of the Board within 20 days.

Sincerely,

/s/ JOHN C. TRUESDALE

John C. Truesdale

Executive Secretary

cc: Sidney Danielson, Regional Director, Region 2

Jack J. Sissman, Esq.

Eugene M. Kaufman, Esq.

260 Park Avenue South
New York, New York

*Board's Rules and Regulation.

NATIONAL LABOR RELATIONS BOARD

3/12/75 4:20 p.m.

ORDER SECTION

49380

NLRB - Region 2
New York, N.Y.

Saul G. Karmen, Esq.,
Proskauer, Rose, Goetz
& Mendelsohn
300 Park Avenue
New York, N.Y.

Jack J. Sissman, Esq.,
Eugene M. Kaufman, Esq.,
260 Park Avenue South
New York, N.Y.

RE: MERCY COLLEGE, 2-RC-16181. AS IT NOW APPEARS THAT THE BOARD'S TELEGRAPHIC ORDER OF AUGUST 2, 1973, DENYING THE EMPLOYER'S REQUEST FOR REVIEW HEREIN MAY BE THE SUBJECT TO AS PROCEDURAL INFIRMITY, A PANEL OF THE BOARD, CONSISTING OF MEMBERS FANNING, KENNEDY, AND PENELLO, HAS THEREAFTER PERSONALLY CONSIDERED SAID REQUEST FOR REVIEW ON ITS MERITS AND CONCLUDES THAT ON AUGUST 2, 1973, AND THEREAFTER, IT RAISED NO SUBSTANTIAL ISSUES WARRANTING REVIEW.

ACCORDINGLY, SAID REQUEST FOR REVIEW IS HEREBY DENIED

NUNC PRO TUNC.

BY DIRECTION OF THE BOARD:

Mario A. Lauro, Jr.
Assistant Executive Secretary

Fanning, Kennedy, Penello

MERCY COLLEGE 2-RC-16181 RULING 8/3/73 FANNING (1)

7/12/73 Act. RD's Decision and Direction of Election
7/24/73 Employer's Req. for Rev. (rec'd 7/25).
8/2/73 Tel. Order DENYING Req. for Rev. (FANNING, KENNEDY,
PENELLO) Circ. 8/2 Upon further consideration, Req. for Rev.
was again DENIED by PENELLO, 3/11/75; and by FANNING,
AND KENNEDY on 3/12/75.
3/12/75 Tel. Order DENYING Req. for Rev.

EXHIBIT 8

[Letter to Ms. Betty S. Murphy from Marvin Dicker, April 4, 1975]

* * * *

Ms. Betty S. Murphy
Chairman
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Mercy College Case Nos. 2-CA-13565; 2-RC-16181 –
Request for Records under the Freedom of Information Act

Dear Madam Chairman:

In accordance with Section 102.117(c)(2)(iii) of the Board's Rules and Regulations we herewith appeal the decision of John C. Truesdale, Executive Secretary of the Board, with respect to the release of certain Board documents relevant to the above-named cases.

On January 13, 1975 in a letter addressed to Abraham Borenstein, Staff Attorney, Region 2 (Exhibit "A") one of several grounds we urged for the dismissal of the unfair labor practices Charge filed against Mercy College on December 24, 1974 was that the decision by the Board to deny the Employer's Request for Review on all but one of its objections was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one Board member and two staff assistants.

In addition, we requested certain documents from the Board to prepare our defense to the Charge, including: all documents, papers and records, including agenda, memos, case summaries, etc. of the National Labor Relations Board and particularly members Miller, Jenkins and Fanning, their agents, employees, attorneys and assistants and Robert Volger, his agents and assistants and in particular

any such documents, papers and records in the Review Section of the Board relating to consideration of the Employer's Request for Review.

On February 3, 1975 we received a response to our letter from Mr. Truesdale (Exhibit "B") in which he indicated that the decision referred to in our letter of January 13, 1975 had been made personally by three members of the Board and that our request for certain documents was otherwise denied.

We responded to Mr. Truesdale's letter on February 11, 1975 (Exhibit "C") stating therein that the quorum requirement of the Act, as amended, was not met on July 23, 1973 when the Board denied the Employer's Request for Review after the issuance of the Decision and Direction of Election by the Regional Director; that the quorum requirements was again violated on May 13, 1974 when the Board denied the Employer's request for reconsideration of its Request for Review in light of the Supreme Court's decision in NLRB v. Textron, Inc., 85 LRRM 2945 (April 23, 1974); and that the Executive Secretary failed to supply any evidence other than a statement issued in October, 1974 that procedures were changed in late 1973 to conform with the decision of the Court of Appeals dated May 8, 1974. Further, we again requested the same documents, as well as those relating to the Request for Review after the election and the Request for Reconsideration, as we requested in our letter of January 13, 1975.

On March 12, 1975 we received a telegram from Mario A. Lauro, Jr., Assistant Executive Secretary of the Board (Exhibit "D") which stated that the Board's telegraphic order of August 2, 1973 denying the Employer's Request for Review may be subject to a "procedural infirmity". As a result, a panel of the Board had reviewed the original Request for Review and found that it raised no substantial issues warranting review. Accordingly, said Request for Review was denied nunc pro tunc almost two years later. We responded to this telegram in a letter dated March 14, 1975 to Mr. Truesdale (Exhibit "E") in which we requested the following information and documents: The nature and quality of any procedural infirmity

that surrounded the Board's decisions on or about August 2, 1973, April 30, 1974 and May 13, 1974 in this case. In addition, we requested the names of the Board member, if any, who attended and acted upon each of these decisions.

In a letter dated March 14, 1975 (Exhibit "F") Mr. Truesdale provided us with a copy of a document alleged to be the docket for the ruling reached on or about August 2, 1973, but failed to supply us with the dockets for any of the other decisions reached in this case or with any of the other documents we requested in our previous letters.

Pursuant to the procedures set forth in the Board's Rules and Regulations we hereby request the following information.

- (1) All final opinions and orders and the official record of the final votes of each member of the Board in every agency proceeding with respect to the Board's decisions in the above case on or about August 2, 1973.
- (2) All final opinions and orders and the official record of the final votes of each member of the Board in every agency proceeding with respect to the Board's decisions in the above case on or about April 30, 1974.
- (3) All final opinions and orders and the official record of the final votes of each member of the Board in every agency proceeding with respect to the Board's decisions in the above case on or about May 13, 1974.
- (4) All documents, papers, and records, including agenda memos, case summaries, etc. of the National Labor Relations Board and particularly members Miller, Jenkins and Fanning, their agents, employees, attorneys and assistants and Robert Volger, his agents and assistants and in particular any such documents, papers and records in the Review Section of the Board relating to consideration of the Employer's Request for Review, after the issuance of the Regional Director's Decision and Direction of Election, the subsequent Request for Review after the election and Request for Reconsideration.

The above information is sought pursuant to the Freedom of Information Act and the Board's regulations promulgated thereunder. We are prepared to assume any cost entailed in providing us with the requested materials.

Sincerely yours,

/s/ MARVIN DICKER

Marvin Dicker

MD:fs

EXHIBIT 9

NATIONAL LABOR RELATIONS BOARD

Washington, D. C. 20570

May 2, 1975

Marvin Dicker, Esquire
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Re: *Mercy College*
Cases 2-CA-13565
2-RC-16181

Dear Mr. Dicker:

This is to acknowledge receipt of your letter dated April 4, 1975, appealing the decision of Executive Secretary John Truesdale with respect to the release of certain Board documents relevant to the abovenamed cases.

In your appeal letter you requested "all final opinions and orders and the official record of the final votes of each member of the Board" with respect to Board decisions issued on or about August 2, 1973, as well as decisions issued on or about August 2, 1973, as well as decisions issued on or about April 30, 1974, and on or about May 13, 1974. My review of your letters of March 14 and February 11 do not indicate such specific requests were made initially with respect to Board orders of April 30, 1974 or May 13, 1974, as I believe the documents noted and enclosed hereafter would have been furnished you by the Executive Secretary.

To avoid any further delay, however, I will treat your requests as a valid appeal in this instance. Enclosed herewith is the docket card and telegraphic order denying the appeals with respect to the Board decision issued on or about April 30, 1974, and that issued on or about May 13, 1974.

You have already been furnished the docket card and a copy of the telegraphic order regarding the August 2, 1973 request for review.

The one docket card and two telegraphic orders constitute the record vote and the final opinion and orders of the Board panel which decided such cases. With respect to any other documents incorporated in your latest request, they relate to the deliberative processes of the Board in its adjudication of this case and their disclosure would be destructive of adjudicatory responsibility. *International Paper v. F.P.C.*, 438 F.2d 1349, 1358-9 (C.A. 2, 1971); *Sears, Roebuck & Co. v. N.L.R.B.*, 433 F.2d 210 (C.A. 6); *United States v. Morgan*, 313 U.S. 409, 422; See also *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964-5, and H. Rept. 1497, 89th Congress 2nd Session, p. 10, and Attorney General Memorandum on the Public Information Section of the APA, U.S. Department of Justice, June 1967, p. 35 and a subsequent Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, p. 20.¹ Sec. (b)(5), 5 U.S.C. Section 552(b)(5) exempts from disclosure intra-agency memoranda or letters not available by law to a party other than an agency in litigation with the agency. Your request as to all other documents is, therefore, denied. You have under the statute a right to judicial review of this decision.²

I trust the additional explanation and documents furnished you will be of assistance.

Sincerely,

/s/ BETTY SOUTHARD MURPHY

Betty Southard Murphy

Chairman

Enclosures 3

¹ See also *Renegotiation Board v. Gruman Aircraft Engineering Corp.*, Sup. Ct. Docket No. 73-1316, opinion issued April 28, 1975, where the Court concluded that predecisional deliberative advice and recommendations need not be disclosed as they fall within exemption 5.

² 5 U.S.C. 552(a)(6)(A).

[Docket Card]

MERCY COLLEGE

2-RC-161

SUPPLEMENTAL

OPP. 4/22/74

JENKINS

3/7/74	RD's Supplemental Decision (open and count)
3/28/74	Ext. granted to 4/5 to file Req.
4/5/74	Employer's Req. for Rev. (rec'd 4/5)
4/16/74	Ext. granted to 4/22 to file Opposition
4/24/74	Petitioner's Opposition rec'd
4/30/74	Tel. Order GRANTING as to Objection 1. (JENKINS, MILLER, FANNING) Circ. 5/1
5/6/74	Tel. from Emp. requesting reconsideration of Issue 2
5/8/74	Petitioner's Opposition rec'd
5/13/74	Tel. Order DENYING Req. for Rec. (J, M, F) C 5/14
6/4/74	Dec. to Editorial
6/18/74	Decision on Rev. to Bd Mbr
6/20/74	Decision on Rev. Circ.
8/16/74	Decision on Review and Order (MILLER, JENKINS, Fanning dissenting) 212 NLRB No. 134

NATIONAL LABOR RELATIONS BOARD

ORDER SECTION

4/30/74 - 11:00 am

MAL/gpp

49325

Saul G. Kramer, Esq.
 Proskauer, Rose, Goetz and Mendelson
 300 Park Avenue
 New York, New York

Jack J. Sissman, Esq.
 Eugene M. Kaufman, Esq.
 260 Park Avenue South
 New York, New York

Mercy College Faculty Council
 Attn: Dr. Ann Grow and Richard E.
 Miller, President
 555 Broadway
 Dobbs Ferry, New York

NLRB Region 2
 New York, New York

RE: MERCY COLLEGE, 2-RC-16181. EMPLOYER'S REQUEST FOR REVIEW
 OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION IS HEREBY
 GRANTED WITH RESPECT TO OBJECTION 1 AS IT RAISES SUBSTANTIAL
 ISSUES WARRANTING REVIEW. IN ALL OTHER RESPECTS THE REQUEST
 FOR REVIEW IS DENIED.

BY DIRECTION OF THE BOARD:

MARIO A. LAURO, JR.
 ASSISTANT EXECUTIVE SECRETARY

(Chairman Miller, Jenkins, Fanning)

NLRB – ORDER SECTION

5/13/74 -

RV/np

49326

Marvin Dicker, Esq.
 Saul C. Kramer, Esq.
 Proskauer, Rose, Goetz and Mendelson
 300 Park Avenue
 New York, New York

Mercy College Faculty Council
 Attn: Dr. Ann Grow and
 Richard E. Miller
 555 Broadway
 Dobbs Ferry, New York

Jack J. Sissman, Esq.
 Eugena M. Kaufman, Esq.
 260 Park Avenue South
 New York, New York

NLRB Region 2
 New York, New York

RE: MERCY COLLEGE, 2-RC-16181. EMPLOYER'S REQUEST FOR RE-
 CONSIDERATION IS HEREBY DENIED AS IT CONTAINS NOTHING NOT
 PREVIOUSLY CONSIDERED. BY DIRECTION OF THE BOARD:

Robert Volger
 Deputy Executive Secretary

(Chairman Miller, Members Fanning, Jenkins)

EXHIBIT U

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MERCY COLLEGE

AND

MERCY COLLEGE FACULTY COUNCIL

CASE NO. 2-CA-13565

ORDER POSTPONING HEARING

IT HEREBY IS ORDERED that the hearing in the above-entitled matter scheduled for April 1, 1975, 11:00 a.m., at 26 Federal Plaza, Room 3614, New York, New York be, and the same hereby is, postponed indefinitely.

Dated at New York, New York this 25th day of March 1975.

/s/ SIDNEY DANIELSON

Sidney Danielson, Regional Director

National Labor Relations Board

Region 2

26 Federal Plaza, Room 3614

New York, New York 10007

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

MOTION FOR SUMMARY JUDGEMENT

AND ISSUANCE OF DECISION AND ORDER

Upon the Charge, Complaint, Notice of Hearing, and Answer herein, and upon the annexed verified petition of Thomas T. Trunkes, Counsel for the General Counsel, the undersigned hereby moves, pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended:

1. That prior to, and without necessity of a hearing, the Board issue a Decision and Order against Respondent, containing findings of fact and conclusions of law, in accordance with the allegations of the Complaint, and remedying the unfair labor practices so found; and
2. That such other, further, and different relief be granted as may be appropriate and proper.

Dated: April 4, 1975

Thomas T. Trunkes
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10017

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

* * * *

ORDER TRANSFERRING PROCEEDING TO THE BOARD

and

NOTICE TO SHOW CAUSE

On February 6, 1975, the Regional Director for Region 2 of the National Labor Relations Board issued a Complaint and Notice of Hearing in the above-entitled proceeding, alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, the Respondent filed an answer, and amended answer, admitting in part and denying in part, the allegations of the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed.

Thereafter, on April 9, 1975, the General Counsel, by counsel, filed with the Board in Washington, D. C., A Motion for Summary Judgment and Issuance of Decision and Order and a Petition, with exhibits attached. The General Counsel submits, in effect, that the Respondent, in its answer, is attempting to relitigate issues which were raised and determined by the Board in the prior representation proceeding Case 2-RC-16181, and that there are no issues requiring a hearing. He, therefore, moves that the Board issue a Decision and Order containing findings of fact and conclusions of law, in accordance with the allegations of the complaint, and remedying the unfair labor practices so found and that such other, further, and different relief be granted as may be appropriate and proper.

The Board having duly considered the matter.

IT IS HEREBY ORDERED that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board in Washington, D. C.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, filed with the Board in Washington, D. C., on or before May 6, 1975 (with affidavit of service on the parties to this proceeding), why the General Counsel's motion should not be granted.

Dated, Washington, D. C., April 22, 1975.

By direction of the Board:

George A. Leet

Associate Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

* * * *

STATEMENT IN OPPOSITION TO
PETITION FOR SUMMARY JUDGMENT

The undersigned, Counsel for Mercy College respectfully shows and alleges:

Neil Judge, a Managerial and Supervisory Employee, was Ineligible to Vote in the Election

1. The Regional Director, Region 2 (herein the "Regional Director") of the National Labor Relations Board (herein the "Board") erred in allowing Neil Judge, a proven administrator and supervisor, to vote in the secret ballot election held on November 7 and 8, 1973, despite the fact that administrators and supervisors were excluded from the unit under the Regional Director's Decision and Direction of Election in Case No. 2-RC-16181. (See Petitioner's Exhibit B).
2. Neil Judge, whose name was not on the voter eligibility list, is Director of Athletics for Mercy College. In this capacity he prepares and administers the department's budget and supervises its employees. He has an administrator's letter of appointment and does not attend faculty meetings. The details of his position and responsibilities are more fully set forth in an affidavit by Walter McCathy, Treasurer of Mercy College, attached hereto as Exhibit 1. To our knowledge, this affidavit is the *only evidence* ever submitted to the Regional Director setting forth Neil Judge's position and responsibilities at Mercy College.
3. Pursuant to the evidence contained in this affidavit it is apparent that Neil Judge is a managerial employee. He is so closely aligned with management as to place him in a position of potential conflict of interest

between his employer and other employees and he formulates employer policy and has discretion in the performance of his duties. It is equally apparent that Judge is a supervisor since he has effective authority to hire and fire personnel within his own department.

4. Despite the evidence presented by Respondent herein the Regional Director found Judge to be neither a supervisor nor a managerial employee, basing his decision on "evidence" which Respondent never saw nor had an opportunity to refute. A review of the Regional Director's Supplemental Decision at pp. 27-29 (Petitioner's Exhibit E) demonstrates that he relied on evidence never revealed to Respondent. Thus, the Regional Director found that "according to Judge" certain hours were taught; that "he [Judge] estimates" he spent a majority of his work week in a certain manner; that "Judge labels" a portion of the year as his basketball season. Respondent knows nothing of this "evidence"; Respondent was not confronted with this "evidence"; Respondent had no chance to refute or disprove this "evidence". We submit that all such "findings" must be disregarded.

5. Failing to hold a hearing on this issue, the Regional Director was under an obligation to assume all facts to be as stated by Respondent. *NLRB v. Bata Shoe Co.*, 377 F.2d 821 (9th Cir. 1967). It is apparent that the Regional Director violated established Board precedent by failing to heed this restriction in reaching his conclusion.

6. Relying solely on the evidence presented in the McCarthy Affidavit (Respondent's Exhibit 1) Judge must be excluded as either a managerial or supervisory employee. In the alternative, if the Regional Director received evidence from other sources and found such evidence to be so significant as to influence his decision, he was under an obligation to afford the employer the opportunity to refute its validity in the context of a full scale hearing. In conclusion, at the very least, Respondent is entitled to a hearing concerning the eligibility of Neil Judge. When it is recognized that his vote was

determinative of the results of this election, Respondent's request for a hearing becomes imperative.

The Misrepresentation of the Middle States Association's Report by petitioner Destroyed the Laboratory Conditions of the Election

7. On November 6, 1973, one day prior to the secret ballot election, Petitioner distributed a handbill to members of the voting unit which contained a material misrepresentation of a part of a report prepared by the Middle States Association of Colleges and Secondary Schools, the accrediting body for Mercy College. The handbill is attached hereto as Exhibit 2.

8. The Regional Director found the leaflet to contain a "half truth". (See Petitioner's Exhibit E) It stated that the Middle States Association had found at Mercy College that:

"unchecked administrative authority will lead to rash and arbitrary decision making - 'authoritarian' was their word."

In fact, the full Middle States Association Report, relevant parts of which are attached hereto as Exhibit 3, found the college to be moving toward greater faculty involvement in decision making (Exhibit 3, pp. 7-8). Significantly, a later report prepared by the Middle States Association in 1973 noted the continuing development of a high degree of faculty participation in governance of the college. Relevant parts of that report are attached hereto as Exhibit 4.

9. Governance is a particularly important issue in a college election and was certainly a major campaign issue at Mercy College. That this leaflet was issued the day before the election illuminates the pernicious effect sought by Petitioner. The fact that the Regional Director found the misrepresentation to constitute a "half truth" should in and of itself, and particularly in light of Board precedent, require the holding of a new election. At the very least, the Regional Director was under an obligation to hold a hearing to determine whether this misrepresentation destroyed the laboratory conditions for the election. *NLRB v. Houston Chronicle Publishing Co.*, 300 F.2d 273 (5th Cir. 1962).

Impact on Electorate of the Change of Name
of the Mercy College Faculty Council

10. Petitioner was permitted to call itself by an incomplete and misleading name throughout the campaign and election.
11. (a) On May 4, 1973, with full knowledge and the cooperation of Petitioner herein, Bernard Koozman, New York State Union of Teachers (NYSUT) Field Representative, filed a petition with the Regional Director of the Board in Case No. 2-RC-16181 on behalf of Petitioner herein for certification as the exclusive collective-bargaining representative of all full-time members of the faculty of instructors and librarians employed by Respondent. A copy of said petition is attached hereto as Exhibit 5.
(b) That petition was filed under the full name of Petitioner herein – "Mercy College Faculty Council (affiliation pending – NYSUT – NEA/AFT – AFL-CIO)" (sometimes referred to herein as the "Faculty Council").
(c) On May 17, 1973, that petition was withdrawn and a new petition, signed by Ann E. Grow, President of the Faculty Council, was filed on May 17, 1973 naming the Petitioner as "Mercy College Faculty Council". (Petitioner's Exhibit A).
12. Evidence and testimony elicited at a hearing held on June 7 and 15, 1973, relevant parts of which are attached hereto as Exhibit 6, establishes that this change in name notwithstanding, NYSUT played an active role in the organization of the Faculty Council. Specifically:
 - (a) On April 4, 1973, Arnold Cantor, representative of NYSUT, spoke at a meeting of the full Faculty Council, to discuss affiliation. (Exhibit 6, p. 56-60)
 - (b) Bernard Koozman designed, prepared and NYSUT paid for the authorization cards used by the Faculty Council which were distributed along with NYSUT membership cards on April 18, 1973. (Exhibit 6, pp. 63-66).

(c) On April 27, 1973, various members of the Faculty Council Advisory Board met with Bernard Koozman to check the authorization cards and plan election tactics. (Exhibit 6, pp. 74-83).

(d) On April 30, 1973, Bernard Koozman wrote a letter to the President of Mercy College, with a copy to Ms. Grow, on NYSUT stationery, demanding recognition of its pending affiliate, attached hereto as Exhibit 7.

(e) Jack J. Sissman, Counsel of Record for the Faculty Council during all proceedings of Case No. 2-RC-16181, stated at the public hearing held June 7, 1973 that the Faculty Council's affiliation application was still pending (Exhibit 6, pp. 12-13).

13. At no time during any of the Board proceedings since the summer of 1973 to the present has the Faculty Council indicated that it would not seek affiliation with NYSUT.

14. The Regional Director and Board, in refusing to require the use of the full name of the Faculty Council (Petitioner's Exhibits B and C) failed to measure the impact that the change of name of that organization would have in the voting booths. It is not unlikely that many faculty members objected to affiliation with NYSUT. For purposes of gaining their support in the election, NYSUT and the Faculty Council agreed to eliminate any reference to affiliation during the campaign, despite the Faculty Council's admitted intention to continue seeking such affiliation.

15. The Faculty Council made every conceivable effort to conceal from the electorate its admitted intention to affiliate with NYSUT. The members of the unit voted on the assumption that the Faculty Council was not intending to affiliate with NYSUT, a material misrepresentation sufficient to set aside the election.

The Board Violated Its own
Quorum Requirements

16. The decision by the Board on or about August 3, 1973 to deny the Respondent's Request for Review submitted on or about July 23, 1973 was in violation of the quorum requirement of the Act, as amended, since that decision was reached by only one Board member.

17. (a) Commencing with a letter written January 13, 1975 respondent demanded certain papers necessary for the preparation of its defense to the unfair labor practice charges. The history of that correspondence is set forth in the Petition submitted by Thomas T. Trunkes and Exhibits O-T attached thereto.

(b) Certain of the papers requested were sought to support Respondent's contention that the Board had failed to comply with the quorum requirements in denying all or part of Respondent's Requests for Review on August 3, 1973, April 30, 1974 and May 13, 1974, *NLRB v. Textron, Inc.*, 416 U.S. 267 (1974).

(c) Respondent's concern proved well-founded, as evidenced by a telegram from Mario A. Lauro, Assistant Executive Secretary of the Board, dated March 12, 1975 (Petitioner's Exhibit R) in which it was admitted that the Board violated its statutory duties and responsibilities, and without reason or explanation denied twenty months later Respondent's Request for Review *nunc pro tunc*.

18. The Board's violation of the Act cannot be labeled a "procedural infirmity." Specifically, resort to the "nunc pro tunc doctrine" is, in this instance inapposite; the Board was not simply correcting a clerical error (e.g. failure to properly record an order) but, in fact, decided the issue anew. An administrative agency cannot under these circumstances merely send a telegram correcting this serious error. To be allowed to do so clearly violates the rationale and reason for the court's decision in *NLRB v. Textron*, *supra*.

Respondent Is Entitled to
All Papers Requested

19. In a letter written April 4, 1975 to Ms. Betty S. Murphy, Chairman of the Board, attached hereto as Exhibit 8, Respondent appealed the decision of John C. Truesdale, Executive Secretary of the Board (Petitioner's Exhibit T) with respect to the release of certain Board documents necessary for the preparation of Respondent's defense. In a letter dated May 2, 1975, attached hereto as Exhibit 9, Ms. Murphy denied this appeal.

20. Without access to these papers, Respondent is at a serious disadvantage in preparing its defense. We have already uncovered one defect in the handling of this case by the Board and the few papers we have received raise additional serious questions concerning whether the Board complied with its quorum requirement in denying Respondent's Requests for Review on April 30, 1974 and May 13, 1974. Denial of Respondent's access to the requested documents constitutes a breach of the Freedom of Information Act and of the National Labor Relations Act, as amended.

WHEREFORE, there being several issues that can only be determined at a hearing, Respondent respectfully requests:

1. That Petitioner's Motion for Summary Judgment be denied.
2. That the Unfair Labor Practice Complaint be, in its entirety, dismissed.
3. In the alternative, that a finding be made to remand this proceeding for a hearing on the following issues:
 - (a) the propriety of counting Neil Judge's vote;
 - (b) the effect of the misrepresentation of the Middle States Association report;
 - (c) the impact of the name used by the Faculty Council on the election;

(d) effect on the proceedings of the Board's failure to follow quorum requirements.

4. That Respondent receive all papers requested in its letters to the Board summarized in Exhibit 8.

5. That such other, further, and different relief be granted as may be deemed appropriate and proper.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELL, COHN
Attorneys for Mercy College

BY MARVIN DICKER
A Member of the Firm
300 Park Avenue
New York, N. Y. 10022

Dated: New York, New York
May 15, 1975

I hereby certify that the Statement in Opposition to Petition for Summary Judgment in Case No. 2-CA-13565 has been served this day, by regular mail, on Waldman & Waldman, attorneys for Mercy College Faculty Council; Mercy College Faculty Council, c/o Dr. Mavis Gill; Thomas T. Trunkes, Counsel for the General Counsel, National Labor Relations Board, Region 2; and Sidney Danielson, Regional Director, National Labor Relations Board, Region 2.

PROSKAUER ROSE GOETZ & MENDELSOHN

S/S LAURA E. DRAGER

By _____
Laura E. Drager

Dated: New York, N. Y.
May 15, 1975

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * * * *

DECISION AND ORDER

Upon charge filed on December 24, 1974, by Mercy College Faculty Council, herein called the Union, and duly served on Mercy College, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint on February 6, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 30, 1974, following a Board election in Case 2-RC-16181 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate,¹ and that, commencing on or about September 25, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union

¹ Official notice is taken of the record in the representation proceeding, Case 2-RC-16181, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

has requested and is requesting it to do so. On February 18 and March 19, 1975, Respondent filed its answer and amended answer to the complaint admitting in part, and denying in part, the allegations in the complaint. Affirmatively, Respondent asserts that: (1) the Regional Director erred in allowing an employee to vote because he was a supervisor; (2) certain alleged misrepresentations by the Union destroyed the laboratory conditions for the election; (3) the denial of an evidentiary hearing on these issues violated due process; and (4) the Regional Director allowed the Union to call itself by an incomplete and misleading name throughout the campaign and election. Respondent also asserts that the Board violated the quorum requirements of the Act in its determinations in the representation case.

On April 9, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgement. He argues, in effect, that all issues raised by Respondent's answer were raised and litigated in the underlying representation case, and under well-settled principles Respondent is not entitled to relitigate them herein. Subsequently, on April 22, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled "Statement in Opposition to Petition for Summary Judgment," in which it essentially reasserts the matters raised by its answer to the complaint, with additional argument thereon. Further, Respondent asserts that the Board should provide it with certain documents to enable it to prepare its defense. The Union also filed a statement in reply to the Respondent's statement, basically supporting the position of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Review of the record in the representation case indicates that the arguments propounded by Respondent concerning the rulings of the Regional Director and the Board, both in its answer to the complaint and response to the Notice To Show Cause, were raised and fully litigated in the several stages of that proceeding.² With respect to the contention that due process necessitates a hearing on these issues, we note that Respondent argued that a hearing was required on these grounds in its request for review of the Regional Director's Supplemental Decision in which he resolved the issues Respondent seeks to litigate in this proceeding. The Board, in denying review of all but one of Respondent's objections, did not order a hearing. Moreover, it is established that parties do not have an absolute right to a hearing. It is only when the moving party presents a *prima facie* showing of such "substantial and material issues" which would warrant setting aside the election that he is entitled to an evidentiary hearing.³ It is clear that, absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.⁴

As noted above, Respondent also asserts that the Board's several rulings in the representation proceeding were in violation of the quorum requirement

² On August 2, 1973, and March 12, 1975, the Board denied Respondent's request for review of the Acting Regional Director's Decision and Direction of Election as it raised no substantial issues warranting review. Following the March 7, 1974, issuance of the Regional Director's Supplemental Decision in which he overruled both parties' objections and sustained challenges to two ballots and ordered one opened, Respondent again requested review. On April 30, 1974, the Board granted review on one objection and denied as to the remainder. On August 16, 1974, the Board issued a Decision on Review and Order (212 NLRB No. 134) finding on ballot void and ordering the Regional Director to open and count the remaining challenged ballot.

³ *N.L.R.B. v. Modine Manufacturing Co.*, 500 F.2d 914 (C.A. 8, 1974).

⁴ *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B.*, 424 F.2d 818, 828 (C.A.D.C., 1970).

of the Act. Respondent raised this issue by its January 13 and February 11, 1975, letters in conjunction with its request for certain Board documents pursuant to the Freedom of Information Act. On those occasions, Respondent was advised that there had been no violation of the Act's quorum requirements with regard to the Board's denial of review of the Regional Director's Supplemental Decision on all but one of its objections, or the denial of its request for reconsideration of that decision. It was subsequently advised, however, that with regard to the Board's original denial of review of the Acting Regional Director's Decision and Direction of Election, there may have been a procedural infirmity and that a duly constituted panel of the Board had again considered its request for review and had again determined that it be denied.

In these circumstances, it appears that Respondent is attempting to raise issues which were raised and litigated in various stages of the underlying representation proceeding, or have been previously considered and resolved by the Board.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁵

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.

⁵ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Respondent also renews its request for certain Board documents pertaining to the Board's several rulings in the representation case. These documents were previously requested by Respondent in the letters mentioned above, and by an additional letter dated March 14, 1975. By letters dated February 3 and March 14, 1975, the Board's Executive Secretary granted in part and denied in part these requests, basing the denial on the ground that the documents sought by Respondent related to the deliberative processes of the Board in its adjudication of the matter and thus were not subject to disclosure. Thereafter, by letter dated April 4, 1975, Respondent appealed the Executive Secretary's decision to the Chairman of the Board, and again requested the documents. By letter dated May 2, 1975, Chairman Murphy provided certain of the requested documents and denied Respondent's request as to the remainder on the same grounds given by the Executive Secretary. Respondent has thus exhausted its avenues of appeal in seeking disclosure of these documents within the Board. While Respondent has the right to judicial review of the Board's refusal to grant disclosure of certain documents,⁶ Respondent cannot raise this issue here as a defense in this unfair labor practice proceeding.

Accordingly, Respondent having raised nothing properly litigable in this proceeding, we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is, and has been at all times material herein, a private non-profit college located in Dobbs Ferry, New York. During the past year, which period is representative of its annual operations generally, Respondent derived

⁶ Sec. 102.117(c) (2) (ii) of the Board's Rules and Regulations, Series 8, as amended February 19, 1975; 5 U.S.C. §552(4) (b).

gross revenues from all sources in excess of \$1 million of which in excess of \$50,000 was derived from sources located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Mercy College Faculty Council is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time members of the faculty employed by the Employer including department chairmen, assistant library director and reader service librarians, but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.

2. The certification

On November 7 and 8, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said

unit on August 30, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and
Respondent's Refusal

Commencing on or about September 5, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 25, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 25, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor
Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we

shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Mercy College is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Mercy College Faculty Council is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time members of the faculty employed by the Employer including department chairmen, assistant library director and reader service librarians, but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 30, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 25, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Mercy College, Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Mercy College Faculty Council as the exclusive bargaining representative of its employees in the following appropriate unit.

All full-time and regular part-time members of the faculty employed by the Employer including department chairmen, assistant library director and reader service librarians, but excluding administrative

personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Dobbs Ferry, New York, location copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 2 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. July 11, 1975.

(SEAL)

NATIONAL LABOR RELATIONS BOARD

John H. Fanning, Member

Ralph E. Kennedy, Member

John A. Penello, Member

APPENDIX

D-142

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Mercy College Faculty Council as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time members of the faculty employed by the Employer including department chairmen, assistant library director and reader service librarians, but excluding administrative personnel, the president, assistants to the president, deans and assistant deans, directors and assistant directors of academic advisors, director of the library, all other employees, guards, watchmen and supervisors as defined in the Act.

MERCY COLLEGE
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3614 Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0300.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * * * *

MOTION FOR RECONSIDERATION
AND ISSUANCE OF ORDER DIRECTING A NEW ELECTION

Upon the annexed statement of Marvin Dicker, a member of the firm Proskauer Rose Goetz & Mendelsohn, Attorneys for Mercy College, the undersigned hereby moves, pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended:

1. That in light of the significant expansion and turnover of the unit since the election held November 7 and 8, 1973, the closeness of the election and the existence of serious legal questions arising out of the election, the Board issue an Order directing that the election be set aside and a new election held; and
2. That such other, further and different relief be granted as may be appropriate and proper.

Respectfully submitted,
PROSKAUER ROSE GOETZ &
MENDELSON

Attorneys for Mercy College

By /s/MARVIN DICKER

Marvin Dicker

A Member of the Firm

300 Park Avenue

New York, New York 10022

Dated: New York, New York

September 11, 1975

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

* * * * *

STATEMENT IN SUPPORT OF
MOTION FOR RECONSIDERATION
AND ISSUANCE OF ORDER
DIRECTING A NEW ELECTION

The undersigned, Counsel for Mercy College respectfully shows and alleges:

1. Two years ago, on November 7 and 8, 1973, a representation election was held at Mercy College in a unit determined under the Regional Director's Decision and Direction of Election in Case No. 2-RC-16181. The balloting resulted in 41 votes for the Petitioner and 41 votes against, with 3 votes challenged. In addition, the Employer timely filed six objections. Without a hearing, although there were apparently conflicts in the evidence submitted to the Regional Director, two challenges were sustained and one denied. After that ballot was opened, there were 42 votes for Petitioner and 41 against. Eighty-five persons were eligible to vote in that election.

2. Over the past twenty-two months, since that election, Mercy College has undergone a substantial expansion that has significantly affected every part of the College, including the unit in issue. This expansion includes the opening of 3 extension centers since September 1974, located in White Plains, the Bronx and Yorktown Heights, and the beginning of a coordinate MBA graduate program, developed in conjunction with Long Island University. Many new faculty members – now included within the unit – were hired to teach in these new programs.

3. In effect, the unit has nearly doubled in size as a result of the expansion, so that if an election were held today the unit would consist of 137 eligible voters.

4. Concomitant with the expansion, there has been a sizeable turnover of the personnel in the original unit. Only 59 persons eligible to vote in the 1973 election would still be eligible to vote in an election held today. Thus, unless a new election is held, 78 people — well over half of the present unit — will effectively be deprived of their guaranteed right to select their bargaining representative.

5. Moreover, the form of expansion undergone by the College has dramatically affected the composition of the unit. Many of the faculty hired to staff the extension centers and MBA program are part-time employees. Thus, whereas in 1973 the unit consisted of 59 full-time and 26 part-time employees, it now consists of 66 full-time and 71 part-time employees.

6. The significance of the substantial change in the composition of the unit is even more telling in view of the closeness of the election — a one vote difference. Furthermore, in light of the serious legal issues that arose out of the 1973 election and that are still being litigated, it is plain that the most equitable resolution of this case is to set aside the old election and hold a new one, thus enabling all members of the expanded unit to have a voice in the selection of their bargaining representative.

7. The ordering of a new election in situations comparable to the one at Mercy College is supported by Board precedent. See *Thomas Engine Corp.*, 179 NLRB 1029 (1970) (Election set aside after 20-month lapse and a substantial turnover of employees; *United Transports, Inc.*, 107 NLRB 1150 (1954) (the Employer's reorganization with resulting changes in job assignments and a lapse of 13 months gave rise to the need for a new election).

WHEREFORE, in light of the significant expansion and turnover in the unit since the election held two years ago, the closeness of the election and the existence of serious legal questions arising out of the election that are still in litigation, Respondent respectfully requests:

1. That the Board issue an Order directing that the election be set aside and a new election held.
2. That such other, further and different relief be granted as may be appropriate and proper.

Respectfully submitted,
PROSKAUER ROSE GOETZ & MEN-
DELSON

Attorneys for Mercy College

By /s/ MARVIN DICKER

Marvin Dicker

A Member of the Firm

300 Park Avenue

New York, New York 10022

Dated: New York, New York

September 11, 1975

CERTIFICATE

I hereby certify that the Motion for Reconsideration and Issuance of Order Directing a New Election in Case No. 2-CA-13565 has been served this day, by regular mail, on Waldman & Waldman, attorneys for Mercy College Faculty Council; Mercy College Faculty Council, c/o Dr. Mavis Gill; Thomas T. Trunkes, Counsel for the General Counsel, National Labor Relations Board, Region 2; and Sidney Danielson, Regional Director, National Labor Relations Board, Region 2.

PROSKAUER ROSE GOETZ & MENDELSON

By /s/ LAURA E. DRAGER

Laura E. Drager

Dated: New York, New York

September 11, 1975



NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

September 19, 1975

Re: Mercy College
Case No. T-CA-13565

Harvin Dicker, Esq.
Proskauer, Rose, Gots
& Mendelsohn
300 Park Avenue
New York, New York 10022

Dear Mr. Dicker:

This is to acknowledge receipt of your Motion for Reconsideration and Issuance of Order Directing a Re-Election on behalf of the Employer in the above proceeding.

In the instant case, receipt of a Motion for Reconsideration would have been due in Washington, D.C., on or before August 6, 1975. As your motion was postmarked in New York on September 11, 1975, and received in this office on September 15, 1975, it was untimely submitted.

For the above reasons, we are returning all copies of your motion herewith with the exception of one which has been retained for the Board's informal file.

Very truly yours,

Robert Volger
Deputy Executive Secretary

cc: Martin Markson, Esq.
Valdman & Waldman
501 5th Avenue
New York, New York

NLRB - Region 2
New York, New York

September 23, 1975

Mr. Robert Volger
Deputy Executive Secretary
National Labor Relations Board
Washington, D.C. 20570

Re: Mercy College – Case No. 2-CA-13565

Dear Mr. Volger:

This is in response to your letter of September 19, 1975. We believe the special circumstances of this case are such as to warrant a full review of the College's Motion for Reconsideration.

We acknowledge that parties to a Board proceeding generally should comply with the time requirements set forth in the Board's Rules and Regulations. But unusual circumstances may arise which prevent a party, although acting in good faith, from meeting those requirements.

In point of fact, the Board's Rule and Regulations provide sufficient leeway to cover such circumstances:

"Any motion pursuant to this subsection shall be filed within 20 days, *or such further period as the Board may allow*, after the service of its decision or order . . ." (R & R, § 102.48(d) (2)) (Emphasis added)

Plainly, this flexibility serves to complement the statutory authority which provides that:

"Until the record in the case shall have been filed in a Court . . . the Board may *at any time, upon reasonable notice and in such manner as it shall deem proper*, modify or set aside . . . any finding or order issued by it." Section 10 (d) of the Act. (Emphasis added)

We contend that certain events which have only recently occurred at Mercy College necessitate the waiver of the usual 20-day filing requirement

pursuant to § 102.48(d) (2) of the Board's Rules and Regulations.

The Statement in Support of the College's Motion makes plain that the bargaining unit has recently been in a state of flux. It has only been with the start of the new semester—this September—that the size and members of the faculty became sufficiently stabilized for the College to determine the figures that underly its Motion. Indeed, one of the extension centers that caused the tremendous increase in the size of the unit did not even open, and was not fully staffed, until September, 1975. As soon as the statistics were available, the College filed its Motion.

Moreover, rather than seeking delay as the Faculty Council contends in its Opposition papers, the College seeks by this Motion to reach an earlier resolution of the proceeding that would otherwise occur. By ordering a new election, not only will the Board prevent a costly and time-consuming court proceeding, but — and most important — it will afford all of the members of the unit an opportunity to participate in the election of their bargaining representative. See *NLRB v. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974) (Remand to Board to consider validity of certification 5-1/2 years old.)

The record in this proceeding has not yet been filed with the Court of Appeals. Pending such a move, it is within the Board's power to consider the merits of the College's petition. See, Sections 10(c) and (d) of the Act; Rules and Regulations, Sections 102.48, 102.49. In light of this statutory prerogative, and all of the facts presented above, we strongly urge the Board to review its position and to determine the merits of the College's Motion for Reconsideration.

Very truly yours,

/s/MARVIN DICKER

Marvin Dicker

MD:sc

cc: Waldman & Waldman
Att: Martin Markson, Esq.
501 Fifth Avenue
New York, New York 10017

NLRB - ORDER SECTION

10/8/75 10:20 a.m.

RV/mec

49325

Marvin Dicker, Esq.
Proskauer, Rose, Goetz
& Mendelsohn
300 Park Avenue
New York, New York

Waldman & Waldman
Attn: Martin Markson, Esq.
501 5th Ave.
New York, New York

RE: MERCY COLLEGE 2-CA-13565 EMPLOYER'S REQUEST FOR REVIEW
OF THE REJECTION OF THE EMPLOYER'S MOTION FOR RECONSIDERA-
TION AS UNTIMELY AND REQUEST FOR CONSIDERATION OF THE
MOTION FOR RECONSIDERATION ON ITS MERITS ARE DENIED AS
THE MOTION FOR RECONSIDERATION WAS UNTIMELY FILED.

ROBERT VOLGER
DEPUTY EXECUTIVE SECRETARY

PENELLO
FANNING
MURPHY